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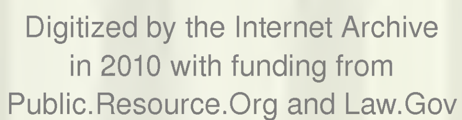
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No. 12393

United States Court of Appeals

For the Ninth Circuit.

COLUMBIA LUMBER COMPANY, INC.,
a Corporation

Appellant,

vs.

BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of Barry Arm Camp,

Appellees,

BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of Barry Arm Camp,

Appellants,

vs.

COLUMBIA LUMBER COMPANY, INC.,
a Corporation,

Appellee.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 364)

Appeals from the United States District Court, for the Territory of Alaska Fourth Division.

FILED

FEB 2 - 1950

PAUL P. O'BRIEN,
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12393

United States
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Anchorage, Alaska,

Attorneys for Defendant.

In the District Court for the Territory of Alaska,
Third Judicial Division

No. A-5207

BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of BARRY ARM CAMP,

Plaintiffs,

vs.

COLUMBIA LUMBER COMPANY, INC., a corporation,

Defendant.

AMENDED COMPLAINT

Comes now the above-named plaintiffs and for their cause of action against the defendant, complain and allege as follows:

I.

That plaintiffs, Bruno Agostino and Stanley Socha, at all times herein mentioned were co-partners, doing business under the firm name and style of Barry Arm Camp.

II.

That plaintiffs are informed and believe, and therefore allege the facts to be true, that the defendant is now, and, at all times herein mentioned was, a corporation organized and existing under and by virtue of the Laws of the Territory of Alaska.

III.

That from some time during the year of 1944, and up to and including, on or about the 24th day of March, 1948, plaintiffs were a partnership engaged in a logging business under the firm name and style of Barry Arm Camp, on M*u*squito Creek in Prince William Sound, Territory of Alaska.

That prior to July 10, 1948, and on or about June 23, 1945, a timber sale agreement had been issued to the plaintiffs by the United States Department of Agriculture, by and through the Forest Service, and said plaintiffs were in possession of the lands covered thereby. That on or about July 10, 1948, an extension agreement was entered into by the above-mentioned parties, which extension agreement, extended all of the rights of the plaintiffs and their assigns up to and including December 31, 1948.

IV.

That on or about the 24th day of March, 1948, the plaintiffs entered into an oral contract with the defendant, acting by and through (their) its agents, servants, employees and officers, Kenneth D. Lambert, Ted Rowell, Tom Morgan, Ted Ray and a certain Mr. Griffit, by which plaintiff sold to, and the defendant purchased all of plaintiff's logging equipment, machinery, buildings and rights including such rights as the plaintiff's had under the timber permit and such extensions as were made; which included the right to cut two hundred and fifty

thousand (250,000) feet of timber, and agreed to pay therefor the sum of $25,000.00, on or before the 10th day of April, 1948.

V.

That relying upon defendant's promise to pay to plaintiffs the said sum of $25,000.00 on or about the 10th day of April, 1948, as full consideration for all of plaintiffs' said equipment, machinery, building, rights, and timber permit or rights then situate in, at, on or near, or pertinent to, said Barry Arm Camp. Plaintiffs on or about the 24th day of March, 1948, gave to, and defendant, acting through its president, Tom Morgan, its foreman and superintendent Kenneth D. Lambert and Ted Rowell and other employees whose name and title of employment are unknown to these plaintiffs but well known to the defendant, accepted full, complete and absolute possession of same; and that defendant has ever since had, and been in possession of same, except for the said 250,000 feet of timber which defendant has already cut and removed; have kept, used and operated said equipment, still has possession thereof and has failed, neglected and refused to pay the plaintiffs therefor.

Said defendant acting by and through its president and general manager, Tom Morgan, its superintendent, foreman and its other officers, agents and employees above-named fully ratified said oral contract, accepted and now retain the benefits therefrom, became bound thereby, and is now estopped to deny the liability thereby created and is obligated

and bound to pay according to the terms thereof, the sum of $25,000.00.

VI.

That, although plaintiffs have frequently made demand of defendant for the payment to them of the said sum of $25,000.00 as the purchase price agreed to between plaintiffs and defendant for said equipment, machinery, buildings and all rights that they had under the timber permit, no part of same has been paid by defendant to the plaintiffs, and that there is still due, owing and unpaid by defendant to plaintiffs the said sum of $25,000.00, together with interest thereon at the rate of six per cent (6%) per annum from the 10th day of April, 1948, all of said sum and interest thereon being payable in lawful money of the United States of America.

VII.

Plaintiffs further allege, that they are entitled to recover from the defendant the further sum of $5,000.00 as a reasonable attorney's fees for the prosecution of this action, and that the same be taxed as a part of the costs.

For a Second and Separate Cause of Action,

Plaintiffs Allege:

I.

That the plaintiffs incorporate herein and by reference make the same a part of this their Second Cause of Action, all of the allegations in paragraphs numbered I, II, III and VII of their First Cause

of Action herein above set forth, and in addition thereto allege

II.

That plaintiffs offered to sell all of their logging equipment, machinery, buildings and all rights that they had under their timber permit and extensions thereto and to give defendant possession thereof for the sum of $25,000.00, and the defendant acting by and through its agents, officers and employees named in their First Cause of Action, agreed to buy same, and to pay plaintiffs the sum of $25,000.00 therefor on or before April 10, 1948.

That the plaintiffs did sell and give possession thereof to the defendant, and the defendant did buy same and did take and retain possession thereof, and still retains possession thereof; is now justly and lawfully indebted to the plaintiff in the sum of $25,000.00 together with interest thereon at the rate of six (6%) per cent per annum from April 10, 1948, and by its conduct is estopped to deny said liability in said sum, or any part thereof.

For a Third and Separate Cause of Action,

Plaintiffs Allege

Comes now the plaintiffs above-named and for their third and separate cause of action against against the above-named defendant, allege and state.

I.

That the plaintiffs incorporate herein and by reference make the same a part of this their Third Cause of Action, all of the allegations set forth in

paragraphs I, II, III and VII of their First Cause of Action herein above set forth, and in addition thereto allege and state. That on or about the 24th day of March, 1948, the defendant became indebted to the plaintiffs and became obligated and bound to pay them on or before the 10th day of April, 1948, the sum of twenty-five thousand dollars ($25,000.00) on account of logging equipment, machinery, buildings and rights under plaintiffs timber permit sold and delivered to the defendant by the plaintiffs at the defendant's request in the Third Judicial Division of the Territory of Alaska; which property the defendant accepted and now retains and have failed, neglected and refused to pay the same or any part thereof; that there is now due the plaintiffs from the defendant the sum of $25,000.00 together with interest thereon at the rate of six per cent (6%) per annum from April 10, 1948.

Wherefore, plaintiffs pray for judgment against defendant for the sum of Twenty-five Thousand Dollars ($25,000.00), together with interest thereon at the rate of six per cent (6%) per annum from the 10th day of April, 1948, until paid, together with attorneys' fees in the sum of Five Thousand Dollars ($5,000.00), said sums to be taxed as costs in said action, and their costs and disbursements herein incurred.

/s/ HERMAN H. ROSS,
Attorney for Plaintiffs.

/s/ BAILEY E. BELL,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska—ss.

Herman H. Ross, being first duly sworn, upon oath, deposes and says: That he is one of the attorneys for the plaintiffs mentioned in the above Amended Complaint; that neither of the defendants are in Anchorage, Alaska at this time; that due to the absence of the plaintiffs he makes this verification. That he has read the above and foregoing Amended Complaint, knows the contents thereof and that the same is true, as he verely believes.

/s/ HERMAN H. ROSS.

Subscribed and sworn to before me this the 11th day of December, 1948.

[Seal] /s/ [Illegible]

Notary Public in and for the Territory of Alaska.

My Commission Expires on the 8th day of May, 1950.

[Endorsed]: Filed December 11, 1948.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the above named defendant, and in answer to the First Cause of Action contained in the Amended Complaint of the Plaintiffs, admits, denies and alleges as follows:

I.

In answer to paragraph I. of Plaintiffs' Amended Complaint, the defendant does not have sufficient information on which to form a belief and therefore denies the allegations therein contained.

II.

Defendant admits the allegations contained in paragraph II of Plaintiffs' Amended Complaint.

III.

As to Paragraph III of said Amended Complaint, defendant has insufficient information on which to form a belief and therefore denies that plaintiffs were a partnership engaged in the logging business at the times and at the places alleged in paragraph III of said Amended Complaint.

Defendant admits that on or about June 23, 1945, a timber sale agreement was entered into between the United States Government and the Barry Arm Camp as represented by one, Raymond Grasser, but defendant alleges that said agreement as extended expired on December 31, 1947, and was not revived until July 10, 1948, and on information and belief defendant denies the other allegations contained in Paragraph III of said Amended Complaint.

IV.

In answer to Paragraph IV of said Amended Complaint, defendant admits that Tom Morgan and Ted Rowell were respectively an officer and employee of the defendant, but defendant denies each and every other material allegation therein contained.

V.

Defendant denies each and every material allegation contained in Paragraph V of said Amended Complaint.

VI.

As to Paragraph VI of said Amended Complaint, Defendant denies that $25,000.00 together with interest thereon at the rate of six (6%) per cent per annum, or that any sum whatsoever is now owing by the defendant to the plaintiffs.

VII.

Defendant denies the allegations contained in paragraph VII of said Amended Complaint.

As to Plaintiffs' Third Cause of Action, contained in said Amended Complaint, defendant admits, denies and alleges as follows:

I.

The defendant incorporates herein and by reference makes the same a part of its Answer to Plaintiffs' Third Cause of Action, of said Amended Complaint, all of paragraphs numbered I, II, III and VII of its Answer to paragraphs numbered I, II, III and VII of Plaintiffs' First Cause of Action which have been incorporated in Plaintiffs' Third Cause of Action, and Defendant denies each and every other material allegation contained in Plaintiffs' Third Cause of Action.

Wherefore defendant prays that Plaintiffs' Amended Complaint be dismissed, and that they go without day, and that defendant have judgment

against the plaintiffs for its costs and disbursements herein, including a reasonable attorneys' fee, and for such other and further relief as may be meet and just in the premises.

FAULKNER, BANFIELD & BOOCHEVER,
/s/ J. L. McCARREY, JR.,
Attorneys for Defendant.

United States of America,
Territory of Alaska—ss.

I, Thomas A. Morgan, being first duly sworn, depose and say: That I am President of the above named defendant corporation, Columbia Lumber Company, Inc.; that I have read the foregoing Answer to Amended Complaint and know its contents and that the facts stated therein are true and correct as I verily believe; and that I make this verification on behalf of said defendant.

/s/ THOS. A. MORGAN.

Subscribed and sworn to before me this 7th day of February, 1949.

[Seal] /s/ R. BOOCHEVER,
Notary Public for Alaska.

My Commission Expires Oct. 20, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 11, 1949.

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT

Come now the above named plaintiffs and in compliance with the ruling and order of the Court, file this, their second amended complaint, and for their cause of action, allege and state:

I.

That plaintiffs Bruno Agostino and Stanley Socha, at all times herein mentioned were co-partners, doing business under the firm name and style of Barry Arm Camp.

II.

That plaintiffs are informed and believe, and therefore allege the facts to be true, that the defendant is now, and, at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the Territory of Alaska.

III.

That from sometime during the year of 1944, and up to and including the 24th day of March, 1948, plaintiffs were a partnership engaged in a logging business under the firm name and style of Barry Arm Camp, on Mosquito Creek in Prince William Sound, Territory of Alaska.

That on or about June 23, 1945, a timber sale agreement had been issued to the plaintiffs by the United States Department of Agriculture, by and through the Forest Service, and said timber sale agreement had been renewed and extended up to the 31st day of December 1948; the plaintiffs were

in possession of the land covered thereby, and were entitled to cut 250,000 feet BM of logs and timber, and had paid in advance for said privilege, the sum of two hundred fifty dollars, ($250.00).

IV.

That the plaintiffs were also the owners of the following described property, in and around Barry Arm Camp, near the mouth of Mosquito Creek on Prince William Sound, in the Third Judicial Division of the Territory of Alaska, as follows, to wit:

1—24′x30′, two story bunk house and cook house, furnished with a stove, cooking utensils, dishes, beds, matresses and springs of the reasonable value of $6000.00;

20—boom logs and 20 connection chains of the reasonable value of $734.00;

That plaintiffs had built roads that cost them $2000.00, and were of the reasonable value of $2000.00;

Blocks and lines of the reasonable value of $1500.00;

1—Donkey engine and cables of the reasonable value of $5000.00;

1—Donkey sled of the reasonable value of $1,-000.00;

1—D-8 caterpillar tractor of the reasonable value of $5000.00;

1—D-7 caterpillar tractor of the reasonable value of $5000.00;

1—saw mill of the reasonable value of $1950.00;

1—electric light plant of the reasonable value of $100.00;

1—drill press of the reasonable value of $150.00;

2—vices of the reasonable value of $50.00;

1—anvil of the reasonable value of $25.00;

Mixed tools of the reasonable value of $1000.00;

Timber rights for the cutting of 250,000 feet BM, of which 25,000 feet was suitable for trap logs, and were worth to the plaintiffs, or any other persons in the logging business, similarly situated, the sum of $45.00 per 1000 feet, and it would cost approximately $22.50 per 1000 feet to cut and market the same, leaving a profit in the actual value of the timber rights to be $562.50 on the trap logs, and the balance of said timber, to wit: 225,000 feet BM at $22.00 per 1000 feet, would market for $4950.00 in the waters of Mosquito Creek at Barry Arm Camp, and it would cost plaintiffs or defendant either, approximately 50% of that amount to cut and market said timber, and that the net value of the timber would be $2475.00;

6—barrels of diesel oil of the reasonable value of $90.00;

1½—barrels of gasoline of the reasonable value of $22.50;

A log pond that had cost the plaintiffs for one month of labor of four men and a caterpillar tractor $3753.00, and that the pond was of the reasonable value of $3753.00;

That said property above described was, at all times herein alleged, of the reasonable value of $37,412.00.

V.

Plaintiffs further allege that on or about the 24th day of March, 1948, the plaintiffs sold to the defendant, Columbia Lumber Company, Inc., a corporation, all of the above described property, and gave to the defendant, at its request, possession of all of the above described property, and the defendant thereby became indebted to the plaintiffs and obligated to pay the plaintiffs therefor, the reasonable value thereof.

VI.

That the defendant did take the property, now retains the same, and has failed, neglected, and refused to pay the plaintiffs therefor, and has paid nothing to the plaintiffs for the same. That by reason thereof, the defendant is justly indebted to the plaintiffs in the sum of $37,412.00, but plaintiffs seek to recover only the sum of $25,000.00; that due demand for the payment thereof, has been made by the plaintiffs on the defendant, and that the defendant has failed, neglected, and refused to pay said sum, or any part thereof, and that the same is now all due and owing from the defendant to the plaintiffs.

Wherefore, plaintiffs pray judgment against the defendant for the sum of $25,000.00, with interest thereon from the 24th day of March, 1948, at the

rate of 6% per annum, and all costs of this action, including a reasonable sum as attorneys' fees, to be fixed by the Court, and for such other and further relief as the Court deems just and equitable in the premises.

/s/ BAILEY E. BELL,
/s/ HERMAN H. ROSS,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska.

Bruno Agostino, being first duly sworn on oath, deposes and says: That he is the above named plaintiff mentioned in the foregoing Complaint; that he has read the same and knows the contents thereof, and that the same is true and correct as he verily believes.

/s/ BRUNO AGOSTINO.

Subscribed and Sworn to before me this 2nd day of June, 1949.

[Seal] /s/ BAILEY E. BELL, JR.,
Notary Public,
Territory of Alaska.

My commission expires 5/3/53.

Service of a copy of above acknowledged this 2nd day of June, 1949.

/s/ EDWARD V. DAVIS,
Of Attorneys for Defendant.

[Endorsed]: Filed June 2, 1949.

[Title of District Court and Cause.]

MOTION TO STRIKE AND MAKE MORE DEFINITE AND CERTAIN

Comes now the defendant in the above entitled action, by and through its attorneys, and moves the Court as follows:

I.

To strike so much of paragraph VI of plaintiff's second amended Complaint as commences on line four of said paragraph and as reads as follows:

"$37,412.00, but plaintiffs seek to recover only the sum of"

for the reason that that portion of said second amended Complaint is irrelevant, redundant and frivolous.

II.

To require the plaintiffs to make their second amended Complaint more definite and certain by setting forth, with reference to paragraph V thereof, the name or names of the person or persons to whom plaintiffs sold the property described in said paragraph, and the name or names of the person or persons at whose request it is alleged that possession was given to said property, and in what capacity said person or persons claimed to be acting for the defendant.

III.

To require the plaintiffs to make their second amended Complaint more definite and certain by

setting forth, with respect to paragraph VI thereof, the name or names of the individual or individuals who demanded payment of the defendant, the time and place where such demand was made, the name or names of the person or persons who allegedly received such demand on behalf of the defendant, and in what capacity such person or persons claimed to be receiving such demand.

Dated at Anchorage, Alaska, this 2nd day of June, 1949.

FAULKNER, BANFIELD & BOOCHEVER and DAVIS & RENFREW,
Attorneys for Defendant.

By /s/ R. BOOCHEVER.

Copy received this 2nd day of June, 1949.

/s/ HERMAN H. ROSS,
Attorney for Plaintiffs.

[Endorsed]: Filed June 2, 1949.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM TO SECOND AMENDED COMPLAINT

Comes now Columbia Lumber Company, Inc., a corporation, the above named defendant, and by way of answer and counterclaim to plaintiff's Second Amended Complaint, admits, denies and alleges as follows:

I.

Defendant admits the allegations of Paragraphs I and II of plaintiff's Second Amended Complaint.

II.

Defendant admits the allegations of the first paragraph of Paragraph III of plaintiff's Second Amended Complaint, except that defendant alleges that in all negotiations concerning the matter here at issue, defendant dealt with the plaintiff, Bruno Agostino, and at that time defendant had no knowledge or information that plaintiff, Stanley Socha, was interested in the property which is the subject of this action.

III.

Defendant admits that on or about the 23rd day of June, 1945, a timber sales agreement was issued to certain parties believed by defendant to be predecessors in interest of the plaintiffs by the United States Forest Service, an agency of the United States Department of Agriculture, and that said timber sales agreement was renewed and extended to and including the 31st day of December, 1948, and in that connection alleges that the timber sales agreement above mentioned expired on the 31st day of December, 1947 and was, on or about the 10th day of July, 1948, renewed and extended for the period ending December 31, 1948. Defendant has no knowledge or information sufficient to form a belief concerning the other allegations of the second paragraph of Paragraph III of plaintiff's Second

Amended Complaint, and for that reason denies each and all of such allegations.

IV.

Defendant has no sufficient knowledge or information to form a belief concerning the allegation contained in Paragraph IV of plaintiff's Second Amended Complaint having to do with the ownership of the property described in said paragraph and located in and around Barry Arm Camp, and for that reason denies each and all the allegations contained in such paragraph concerning ownership of the property. Defendant specifically denies that the values set opposite the various items in such paragraph were or are the reasonable value of such items, or that such property in the aggregate was of the reasonable value of $37,412.00, or any sum at all in excess of $9,000.00 for all the property owned by plaintiffs or claimed by them at the time and place in question. In that connection, as defendant is informed and believes, and so alleges the fact to be, certain of the property described in Paragraph IV of plaintiff's Second Amended Complaint belonged to third parties, and has since been repossessed and taken from the premises by such third parties, to-wit:

1 donkey engine and cables
1 D-8 caterpillar tractor
1 D-7 caterpillar tractor

V.

Defendant denies each and all the allegations of

Paragraph V of plaintiff's Second Amended Complaint, and in that connection alleges that on or about the last day of June, 1948, plaintiff, Bruno Agostino, and defendant reached an agreement for the sale of the property located at plaintiffs' camp at Barry Arm Camp for the sum of $10,000.00, and that such agreement was reduced to writing and was by the plaintiffs repudiated, all as will more fully appear from defendant's first affirmative defense hereinafter set forth.

VI.

Defendant admits that it has paid nothing to plaintiffs, and denies each and all the other allegations of Paragraph VI of plaintiff's Second Amended Complaint, and in that connection reference is made to the allegations contained in defendant's first affirmative defense contained in its answer to plaintiff's Second Amended Complaint, and by reference incorporates the allegations of such affirmative defense to the same extent as though set out in full at this point.

First Separate Answer and Affirmative Defense

As a first separate answer and affirmative defense to plaintiff's Second Amended Complaint, defendant alleges as follows:

I.

That on or about the last day of June, 1948, defendant made an oral agreement with the plaintiff, Bruno Agostino, by the terms of which defendant

agreed to purchase and plaintiff, Bruno Agostino, agreed to sell, all of the equipment, buildings and property claimed by the plaintiff located at a place known as Barry Arm Camp, for an agreed price of $10,000.00. $3,300.00 of such sum was to be deposited with the Clerk of the Court pending settlement of a dispute as to title to some of such property between Bruno Agostino and one Roy Grasser, or Ray Grasser. At the same time and place it was agreed by the parties that the oral agreement should be reduced to writing by Harold J. Butcher, attorney for the plaintiff, Bruno Agostino. It was further agreed by the parties that the agreement there reached contained all the terms and conditions in connection with the agreement in question, and that there were no other agreements, verbal or written, pertaining to the sale of the property above mentioned or to the method of payment for such property, except as set forth in the agreement, all as will more fully appear from Exhibit "A" hereto attached and by reference made a part of this paragraph to the same extent as though set out in full herein.

II.

That on or about the 2nd day of July, 1948, the oral agreement above mentioned was reduced to writing, save and except that such agreement as written did not include a list of the property being sold, and thereupon the agreement as written was signed by plaintiff, Bruno Agostino, and acknowledged by said party, and was submitted to defend-

ant by plaintiff's attorney by mail directed to the defendant at Juneau, Alaska.

III.

That defendant received the written agreement above mentioned on or about the 5th day of July, 1948, and thereupon came to Anchorage, Alaska to consult with defendant's attorney about such agreement, and at that time found that defendant's attorney had left Anchorage and would be absent for a short while. That thereafter, on or about the 19th day of July, 1948, defendant notified plaintiff's attorney by letter that the agreement was satisfactory with the exception of the fact that it did not include a list of the propery being sold. That a copy of defendant's letter directed to plaintiff's attorney dated July 19, 1948 is hereto attached marked Exhibit "B," and by reference made a part of this answer to the same extent as though set out in full herein.

IV.

That on or about the 10th day of July, 1948, the agreement above mentioned was executed on behalf of the defendant, by its President, Thomas A. Morgan, and was delivered to defendant's attorney J. L. McCarrey, Jr., of Anchorage, Alaska, together with checks in the amount of $5,000.00 representing the initial payment to be made under the terms of such agreement, together with all other payments to be made by defendant under such agreement until September 15, 1948, and at that time defendant's at-

torney was directed to deliver the executed agreement to plaintiff's attorney and to deposit the initial payment with the Clerk of the Court according to the terms of the agreement upon plaintiff's furnishing a list of the property to be sold in accordance with the oral agreement later reduced to writing above mentioned, and defendant's attorney was directed to deliver the other checks to plaintiff as the amounts represented by such checks became due under the terms of the agreement. At that time plaintiff's attorney was notified that defendant was ready and willing to consummate the purchase agreement upon plaintiff's furnishing the list of property to be sold as above mentioned.

V.

That a copy of the written agreement above mentioned is hereto attached marked Exhibit "A," and by reference is made a part of this answer to the same extent as though set out in full herein.

VI.

That plaintiff refused to furnish a list of the property being sold, and claimed that a part of the property which plaintiff theretofore had agreed to sell, namely, a certain cabin located within the Barry Arm Camp, was not to be included in the sale, and refused to execute a bill of sale or otherwise to consummate the purchase agreement.

VII.

That under the terms of the agreement above mentioned, hereto attached marked Exhibit "A,"

defendant removed two certain caterpillar tractors included in the terms of such purchase agreement from plaintiff's camp, a distance of approximately one mile to defendant's camp, and proceeded to repair such tractors preparatory to using them under the sale defendant thought had been consummated, and that in such repair defendant expended in excess of $2,000.00 in labor and materials.

VIII.

That the caterpillar tractors above mentioned were not used by the defendant at any time for logging porposes, but that one of such tractors was used for the purpose of towing the other tractor from plaintiff's camp to defendant's camp, and for the purpose of hauling a small amount of oil and supplies from one portion of defendant's camp to another portion thereof.

IX.

That under the terms of the agreement above mentioned, a copy of which is hereto attached marked Exhibit "A," defendant used the bunk house portion of plaintiff's Barry Arm Camp as living quarters for one of its employees from approximately the 1st day of August, 1948, to the 1st day of September, 1948.

X.

That immediately upon learning that plaintiff, Bruno Agostino, had repudiated the written agreement above mentioned and had refused to consummate the agreement, defendant, on or about the 1st

day of September, 1948, vacated the bunk house above mentioned and returned the caterpillar tractors above mentioned to their former location on plaintiff's premises.

XI.

That the purchase agreement above mentioned was never consummated due to the refusal of plaintiff to consummate the same, and defendant, as it is informed and believes, and so alleges the fact to be, should not be held liable to plaintiff for any damages. If in fact plaintiff was damaged by such possession, such damages should not exceed the reasonable rental value of the bunk house above mentioned and of the caterpillar tractors above mentioned during the time such property was retained by defendant.

XII.

That defendant did not take possession of the so-called saw mill or the donkey engine, or any of the other equipment which plaintiff had agreed to sell to defendant, except the tractors and bunk house as above set forth.

XIII.

That the tractors above mentioned at the time they were returned to plaintiff's premises, were in better condition than at the time they were removed to defendant's premises, as above set forth, and that the bunk house was left in at least as good condition as it was at the time it was occupied by defendant's employee.

XIV.

That as defendant is informed and believes, and so alleges the fact to be, one of the tractors above mentioned was repossessed by its owner, Ellamar Packing Company, under the provisions of a conditional sales contract entered into between such packing company and the plaintiffs, or their predecessors in interest, such repossession having taken place on or about the 1st day of October, 1948, and that as defendant is informed and believes, and so alleges the fact to be, the donkey engine and the other caterpillar tractor were taken from the premises on or about the 25th day of September, 1948 by one Raymond Grasser under some sort of claim of ownership of such property by the said Raymond Grasser.

XV.

That defendant does not have possession of any of plaintiff's property or equipment, and never had possession of any of such property or equipment except as to the bunk house and the tractors above mentioned, and such roperty was returned by defendant to plaintiff's premises on or about the 1st day of September, 1948, as above set forth.

As a second separate answer and second affirmative defense to plaintiff's Second Amended Complaint, defendant alleges as follows:

I.

Defendant adopts the allegations of Paragraphs numbered I through XV of its first separate answer

and affirmative defense in alleging its second separate answer and affirmative defense, and by reference thereto re-alleges and adopts such allegations to the same extent as though set forth in full herein.

II.

That plaintiff, Bruno Agostino, breached the terms and conditions of the agreement entered into by the parties on or about the last day of June, 1948, above mentioned, by refusing to deliver a list of the property covered by the agreement and by attempting to exclude some of the property covered by the agreement, and by repudiating such agreement, all as has heretofore been set forth.

III.

That in making the agreement above mentioned, plaintiff, Bruno Agostino, expressly and by implication, warranted that he had good title to the property in question free and clear of all encumbrances, and had the present right to sell the same except as to the possible claim of Raymond Grasser to the extent of $3,300, as above set forth.

IV.

That in truth and in fact, as plaintiff well knew, he had no title to the R. D.-8 caterpillar tractor which was a part of the property covered by the agreement, and as plaintiff well knew, such tractor was owned by Ellamar Packing Company, and that the only interest of plaintiff therein was by reason of a conditional sale contract claimed by the vendor to be in default. That as defendant is informed and

believes, and so alleges the fact to be, the vendor, Ellamar Packing Company, on or about the 1st day of October, 1948, repossessed the tractor above mentioned and took it away from Barry Arm Camp to some place unknown to defendant.

V.

That defendant at all times has been ready, willing and able to perform the agreement above mentioned on its part, but was prevented from so performing by the breach of such agreement and its repudiation by plaintiff, Bruno Agostino.

As a third separate and further answer to plaintiff's Second Amended Complaint, and by way of counterclaim thereto, defendant alleges as follows:

I.

Defendant adopts the allegations of Paragraphs numbered I through XV of its first separate answer and affirmative defense and Paragraphs numbered I through V of its second separate answer and affirmative defense, in alleging its third separate and further answer to plaintiff's Second Amended Complaint, and its Counterclaim and by reference thereto re-alleges and adopts such allegations to the same extent as though set forth in full herein.

II.

The plaintiffs were unjustly enriched in the sum of Two Thousand ($2,000.00) Dollars represented by the value of materials and labor expended on the tractors above described by defendant in reliance

upon plaintiffs' agreement made on or about the last day of June, 1948.

III.

That defendant has been damaged in the sum of Two Thousand ($2,000.00) Dollars, the amount expended upon said tractors as a result of the breach and repudiation of the agreement made by the plaintiff, Bruno Agostino.

Wherefore, defendant prays for judgment in this matter as follows:

1. That plaintiffs take nothing by reason of their second Amended Complaint filed in this action.

2. That defendant may have and recover judgment against plaintiffs for the sum of Two Thousand ($2,000.00) Dollars on defendant's counterclaim.

3. For defendant's costs and disbursements in this action incurred, including a reasonable attorneys' fee to be set by the Court.

4. For such other and further relief as to the Court may seem meet and equitable in the premises.

FAULKNER, BANFIELD and BOOCHEVER,
J. L. McCARREY, JR.,
DAVIS & RENFREW,
Attorneys for Defendant,

By /s/ EDWARD V. DAVIS.

United States of America,
Territory of Alaska—ss.

I, Thomas A. Morgan, being first duly sworn, depose and say: That I am President of the above named corporation, Columbia Lumber Company, Inc.; that I have read the foregoing Answer and Counterclaim to Second Amended Complaint and know the contents thereof, and that the facts stated therein are true and correct as I verily believe; and that I make this verification on behalf of said defendant.

/s/ THOS. A. MORGAN.

Subscribed and sworn to before me this 2nd day of June, 1949.

[Seal] /s/ EDWARD V. DAVIS,
Notary Public for Alaska.

My Commission expires: 11-7-1950.

EXHIBIT A.

Sales Agreement

This agreement, entered into this......day of July, 1948, by and between BRUNO AGOSTINO of Anchorage, Alaska, the party of the first part, hereinafter referred to as the seller, and the COLUMBIA LUMBER COMPANY, a corporation organized under the laws of the Territory of Alaska, with headquarters at Juneau, the party of the second part, hereinafter referred to as the purchaser.

Witnesseth: Whereas the seller has in the past performed certain logging operations at Barry Arm in the Prince William Sound area under Forest Service permit, and

Whereas the purchaser is now engaged in similar operations at the same place, and

Whereas upon the termination of the logging operations of the seller, he left certain buildings, materials, and equipment at the Barry Arm Camp, and

Whereas, these buildings, materials, and equipment are of value to the purchaser and said purchaser can make use of the same in its logging operations,

Wherefore, it has been mutually agreed that the seller will sell and the purchaser will purchase all those buildings and all of that equipment and all of those materials now located at Barry Arm in the Prince William Sound area and the purchaser will purchase all of the above mentioned buildings, materials, and equipment for the total sum of Ten Thousand Dollars ($10,000.00), lawful money of the United States, to be paid by the said purchaser to the seller in accordance with the following terms and conditions:

That following the signing of this instrument and before the 10th day of July, 1948, the purchaser will deposit with the Clerk of the District Court for the Third Division at Anchorage, Alaska, by and through Harold J. Butcher, Attorney for the seller, the sum of Thirty Three Hundred Dollars

($3300.00) which sum is to be held on deposit in escrow by said Clerk of said Court for the purpose of saving the purchaser harmless from any claim made against the seller's camp and equipment and materials the subject of this purchase, by Roy Grasser, who has filed suit seeking from the seller the amount above stated; and it is agreed that the said sum will remain on deposit and will be held in escrow with said Clerk until the litigation between the seller and the said Ray Grasser has been settled by the Court. In the event that the seller is successful and a decision is made in his favor that no monies are due and owing to the said Ray Grasser, then said sum will be turned over to the said seller and if the decision is in favor of Ray Grasser in the sum stated or in any part of said sum, then said sum will be paid over to Ray Grasser by the said Clerk of the Court, or that part required to satisfy said judgment. In the event that there remains monies in the escrow account which are not ordered payable to Ray Grasser by the Court, then such sums shall be made payable upon settlement to the seller herein named.

It is further agreed that on or before the 15th day of July, 1948, the purchaser will pay into the account of the seller at the Bank of Alaska at Anchorage the Sum of Seven Hundred Dollars ($700.00), and then commencing on or before the 15th day of August, 1948, the sum of One Thousand Dollars ($1000) per month paid in the account as indicated above and the same sum on each subsequent month

thereafter until six (6) payments of One Thousand Dollars ($1000) each have been made into the account of the Seller. It is specifically agreed that there shall be no payment of interest on any amount herein stated.

Immediately upon the signing of this instrument by the purchaser and notice of such signing conveyed to the seller or to his attorney, Harold J. Butcher, a bill of sale covering all of the buildings, materials and equipment located at Barry Arm will be placed in escrow at the Bank of Alaska to be delivered to the purchaser upon its making payment in full the purchase price herein set forth.

The seller agrees that upon the execution of this instrument, the said purchaser may take possession of said buildings, materials and equipment located at Barry Arm and make use of the same in such manner as the said purchaser desires, and that for all practical purposes said buildings, materials and equipment will be treated as though full title had passed to the purchaser.

This contract and all its terms and conditions shall inure to and be obligatory upon the parties hereto, their heirs, executors, administrators, successors and assigns.

It is hereby specifically agreed that all the terms and conditions in connection with this contract have been set forth herein and that there are no other agreements, verbal or written, pertaining to this sale or the method of paying for the same on the part of purchaser.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 29th day of July, 1948.

/s/ BRUNO AGOSTINO
Seller

COLUMBIA LUMBER COMPANY
By /s/ THOS. A. MORGAN
Pres.

United States of America,
Territory of Alaska—ss.

Be It Remembered that on this 29th day of July, 1948, before me, the undersigned Notary Public in and for Alaska, personally appeared Bruno Agostino, one of the parties named herein, known to me and to me known to be the seller herein named, and he acknowledged to me that he signed and executed the foregoing instrument freely and voluntarily for the uses and purposes therein mentioned.

Witness My Hand and official seal the day and year hereinabove last written.

[Seal] /s/ HAROLD J. BUTCHER,
Notary Public in and for Alaska.

My commission expires April 23, 1949.

EXHIBIT B

July 19, 1948

Mr. Harold Butcher
Attorney at Law
Anchorage, Alaska

Dear Mr. Butcher:

Conformant with your letter of July 2, 1948, I arrived in Anchorage on July 10th and brought the contract back with me to discuss it with you.

I have been advised that it will be another week before you return and find business conditions such that I am unable to wait any longer.

The contract you have prepared is acceptable to the Columbia Lumber Company for the most part, except for the fact that no place is itemized the personal property we are getting for the purchase price of $10,000. That is the reason why I came personally so that I could discuss that portion of the contract with you. I am sure you would not expect me to sign it without a definite understanding as to what the $10,000 is going to purchase.

I have signed a check in the sum of $3,300 and left it with Mr. C. D. Summers, with instructions to pay it to the Clerk of the Court upon your giving him an acceptable list of all the personal property which the Columbia Lumber Company is to get under the contract.

Sorry I didn't get to see you and trust that you

will be able to work this out with Mr. Summers immediately upon your return.

Yours very truly,

/s/ THOMAS MORGAN,
President, Columbia Lumber Company.

[Endorsed]: Filed June 2, 1949.

[Title of District Court and Cause.]

REPLY TO ANSWER AND ANSWER TO COUNTER CLAIM

Come now the above named plaintiffs and for their reply to the answer of the defendant, allege and state:

I.

Plaintiffs deny all the affirmative allegations of paragraph 2.

II.

Plaintiffs deny that the timber sales agreement referred to in paragraph 3 of said answer had expired on the 31st day of December 1947, and allege the facts to be that said timber sales agreement was extended by the payment of $250.00 as evidenced by the check introduced in evidence, dated October 31, 1947, and at no time had the timber sales agreement expired.

III.

Plaintiffs deny the allegations in paragraph 4 of said answer, wherein it is alleged "That certain of the property described in paragraph 4 of plaintiffs' second amended complaint belong to third parties" and allege the facts to be, that all of said property was owned by these plaintiffs herein.

IV.

For answer to paragraph 5, plaintiffs admit that there was at one time an offer of compromise for ten thousand dollars ($10,000.00), and further allege that the defendant failed, neglected and refused to go through with said offer of compromise, and allege the facts to be that the defendant failed to pay the sums of money set forth in said purported contract; failed to pay any part thereof; failed to make the deposit with the Clerk of the Court; failed so far as these plaintiffs know, to ever sign said contract until long after this suit was filed, and deny that the contract was signed by the defendant in this case in good faith, and allege that it was done after this suit was filed and was never delivered to the plaintiffs, and that the signing thereof, was done in bad faith and for the purpose of reducing the plaintiffs' amount of recovery to $10,000.00, and that said contract was not based upon a valuable consideration, was not executed and delivered, and is therefore, not binding on these plaintiffs.

V.

Plaintiffs for reply to paragraph 6, deny the affirmative allegations therein contained, and the whole thereof, except such allegations as are admitted in the folowing paragraph.

Reply to the Defendant's First Separate Answer and Affirmative Defense.

Plaintiffs for reply to the defendant's first separate answer and affirmative defense admit that:

I.

In June or July 1948, the defendant did enter into a compromise agreement with Bruno Agostino, by which the defendant offered to pay, and Bruno Agostino offered to settle for the sum of $10,000.00, with an understanding that $3300.00 of such sum was to be deposited with the Clerk of the Court pending settlement of a dispute as to a title to some of such property between Bruno Agostino and one Ray Grasser, admit that the agreement was to be reduced to writing by Harold J. Butcher, and was reduced to writing, and was signed by Bruno Agostino, and deny all of the rest, residue, and remainder of said paragraph, and further alledge the facts to be that said oral agreement was an offer of compromise and was not based upon any consideration, and that the defendant failed, neglected, and refused to go through with said agreement, and that the compromise made on behalf of Bruno Agostino was by reason of having spent two or three months trying to get the defendant to pay him for his property, and that Bruno Agostino had an agreement

with the president of the defendant company, Thomas Morgan, that he was leaving Barry Arm Camp, and would return in two days and settle with him, and that Bruno Agostino had waited there at the camp for a period of approximately three weeks, and that Thomas Morgan never returned to pay him for the equipment, and that by reason of the promises made on behalf of the defendant company, the plaintiffs had permitted the defendant to come onto his property, and to take possession thereof, and the defendant had gained exactly what it had wanted, by getting in possession of plaintiffs property, and then by dodging the plaintiffs and failing to meet one of the plaintiffs, Bruno Agostino, and had worn him out by dodging him, and running around over the country until, the plaintiff was desperate financially, and that said agreement to settle for $10,000.00 was entered into by Bruno Agostino, rather than to go to Court, and have to employ counsel and pay court costs and other expenses that he was not able to pay, all of which, amounted to oppression, duress, and fraud on the part of the defendant, which fraud was perpetrated by Thomas Morgan, president of said defendant company.

II.

Plaintiffs for answer to paragraph two of the First Separate Answer and Affirmative Defense, of the defendant, admit that a contract was reduced to writing but specifically allege that the plaintiffs, acting by and through, Bruno Agostino, offered to furnish an itemized statement of the property sold

to the defendant, and the defendant, acting by and through, Thomas Morgan, said he did not want an itemized statement, that he knew all about what was there, and that when the bill of sale was made out, the items could be set out therein, in full, but allege that the defendant never complied with said contract, and that the purported contract became void.

III.

Plaintiffs for reply to paragraph three of defendant's First Separate Answer and Affirmative Defense, is not sufficiently informed and advised so as to form an opinion as to the truth thereof, and therefore deny all of the allegations in said paragraph, and the whole thereof.

IV.

Plaintiffs for reply to defendant's First Separate Answer and Affirmative Defense, allege that they are not sufficiently informed or advised as to the truth of the allegations therein contained, and therefore, deny the same, and the whole thereof.

V.

Plaintiffs for reply to paragraph five of the defendant's First Separate Answer and Affirmative Defense deny that said purported written agreement referred to as Exhibit "A" ever became a binding contract between plaintiffs and defendant.

VI.

Plaintiffs for reply to paragraph six of defendant's First Separate Answer and Affirmative De-

fense deny all of the allegations therein contained, and the whole thereof.

VII.

Plaintiffs for reply to paragraph seven of defendant's First Separate Answer and Affirmative Defense allege that they have no knowledge of the allegations therein contained, sufficient to form an opinion as to the truth thereof, and therefore, deny said allegations, and the whole thereof.

VIII.

Plaintiffs for reply to paragraph eight of the defendant's First Separate Answer and Affirmative Defense allege that they are not sufficiently informed so as to form an opinion as to the truth thereof, and therefore, deny the allegations therein contained, and the whole thereof.

IX.

Plaintiffs for reply to paragraph nine of the defendant's First Separate Answer and Affirmative Defense admit that said defendant did use the bunk house and cook house at Barry Arm Camp, but allege the truth to be, that the defendant still has possession thereof, and is now occupying said property, by and through one of its employees, a certain Mr. Hooper.

X.

Plaintiffs for reply to paragraph ten of the defendant's First Separate Answer and Affirmative Defense deny the allegations therein contained, and the whole thereof.

XI.

Plaintiffs for reply to paragraph eleven of defendant's First Separate Answer and Affirmative Defense deny the allegations therein contained, and the whole thereof.

XII.

Plaintiffs for reply to paragraph 12 of defendant's First Separate Answer and Affirmative Defense deny the allegations therein contained, and the whole thereof, except that they admit that the defendant did take possession of the tractor and bunk house, and allege the facts to be, that the defendant took possession of all of the property of the plaintiffs at Barry Arm Camp.

XIII.

Plaintiffs for reply to paragraph 13 of defendant's First Separate Answer and Affirmative Defense, deny the allegations therein contained, and the whole thereof.

XIV.

Plaintiffs for reply to paragraph 14 of defendant's First Separate Answer and Affirmative Defense are not sufficiently informed as to the facts alleged therein, to form an opinion as to the truth thereof, and therefore, deny the said allegations, and the whole thereof, and allege on information and belief, that if the Ellamar Packing Company and the said Ray Grasser did take any of the property sold by the plaintiffs to the defendant, that the same was taken through a scheme and conspiracy brought about by the defendant for the purpose

of cheating and defrauding these plaintiffs, and specifically deny that the Ellamar Packing Company had any interest or an enforceable conditional sales contract effecting any of the property, and specifically deny that Ray Grasser had any interest in the property, or any part thereof, or that either Ray Grasser or the Ellamar Packing Company had any right to take possession of the same.

XV.

Plaintiffs for reply to paragraph 15 of the defendant's First Separate Answer and Affirmative Defense deny the allegations therein contained, and the whole thereof.

Reply to Defendant's Second Separate Answer and Second Affirmative Defense

Plaintiffs for reply to the defendant's Second Separate Answer and Second Affirmative Defense, allege as follows:

I.

Plaintiffs deny the allegations of paragraph 1, and the whole thereof, in defendant's Second Separate Answer and Second Affirmative Defense except such matters as are specifically admitted in this reply.

II.

Plaintiffs for reply to paragraph 2, deny the allegations therein contained, and the whole thereof.

III.

Plaintiffs for reply to paragraph 3, admit the allegations of said paragraph.

IV.

Plaintiffs for reply to paragraph 4 deny all of the allegations therein contained, and the whole thereof, and in addition thereto, allege that if the Ellamar Packing Company did take said tractor, that it was done through the connivance and scheme of the defendant herein, and was wrongfully done, and that the Ellamar Packing Company had no right, title, or interest in and to the said R.D.-8 caterpillar tractor.

V.

Plaintiffs for reply to paragraph 5 deny said allegations, and the whole thereof.

Reply to Defendant's Third Separate Answer and for Answer to the Counterclaim

Plaintiffs for reply to defendants Third Separate Answer and for Answer to the Counter claim, allege as follows:

I.

Plaintiffs deny the allegation of paragraph 1, and the whole thereof, save and except, such matters as are specifically admitted in their Second Amended Complaint, this Reply, and Answer.

II.

Plaintiffs deny all of the allegations of paragraph 2, and the whole thereof.

III.

Plaintiffs deny the allegations of paragraph 3, and the whole thereof.

Wherefore, plaintiffs having fully replied to the Answer, and answered the Counterclaim, pray that they recover as in their Second Amended Complaint prayed for.

/s/ HERMAN H. ROSS,
/s/ BAILEY E. BELL,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska—ss.

Bruno Agostino, being first duly sworn on oath, deposes and says: That he is one of the above-named plaintiffs mentioned in the foregoing Reply and Answer; that he has read the same and knows the contents thereof, and that the same is true and correct as he verily believes.

/s/ BRUNO AGOSTINO.

Subscribed and Sworn To before me this 3rd day of June, 1949.

[Seal] /s/ BAILEY E. BELL,
Notary Public, Territory of Alaska.

My commission expires: 1/28/53.

Service of a copy of the above acknowledged this 3rd day of June, 1949.

DAVIS & RENFREW,
By /s/ P. ROBISON,
Attorney for Defendant.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

MOTION TO STRIKE PORTIONS OF REPLY

Comes now the above-named defendant, by its attorneys, and moves the court to strike the following portions of the reply filed herein by the plaintiffs, for the reasons hereinafter stated:

I.

So much of Paragraph IV of the reply to answer and reply to counterclaim as states on line 2: "offer of compromise"; as states on lines 3 and 4: "said offer of compromise"; line 1 at the top of page 2 of said reply, and so much of lines 3, 4 and 5 of page 2 of said reply as states: "and that the signing thereof was done in bad faith and for the purpose of reducing the plaintiffs' amount of recovery to $10,000, and that said contract was not based upon a valuable consideration"; and so much of line 6 on page 2 of said reply as states: "and is therefore not binding on these plaintiffs," for the reason that said portions of said paragraph are frivolous, irrelevant, immaterial, plead evidence in part and in part consist of conclusions of law.

II.

So much of Paragraph I of the reply to defendant's first separate answer and affirmative defense as follows: The word "compromise" on line 1 of said paragraph; the words "and further allege the facts to be that said oral agreement was an offer of compromise and was not based upon any consideration," as appears on lines 9, 10 and 11 of

said paragraph, and the remainder of said paragraph commencing with the words "and that the compromise" on line 11 of said paragraph, for the reason that said portions of said paragraph are frivolous, irrelevant, immaterial, plead evidence in part and in part consist of conclusions of law, and contains matter prejudicial to the defendant.

III.

So much of Paragraph 11 of said reply to defendant's first separate answer and affirmative defense as states: "that he knew all about what was there and that when the bill of sale was made out the items could be set out therein in full," on lines 6 and 7 of said paragraph, for the reason that said portion of said paragraph is irrelevant, frivolous, immaterial, and pleads evidence; and so much of said paragraph as states "and that the purported contract became void," on lines 8 and 9 of said paragraph, for the reason that said portion of said paragraph is a conclusion of law.

IV.

So much of Paragraph V of said reply to defendant's first separate answer and affirmative defense as states "that said purported written agreement referred to as Exhibit "A" ever became a binding contract between plaintiffs and defendant," for the reason that said portion of Paragraph V of said reply is frivolous, redundant and pleads a conclusion of law.

V.

So much of Paragraph IX of plaintiffs' reply to

defendant's first separate answer and affirmative defense as states: "the truth to be," on line 3 of said paragraph, for the reason that said portion of said paragraph is irrelevant, redundant and frivolous.

VI.

So much of Paragraph XIV of said reply to defendant's first separate answer and affirmative defense as states: "and allege on information and belief that if the Ellamar Packing Company and the said Ray Grasser did take any of the property sold by the plaintiffs to the defendant, that the same was taken through a scheme and conspiracy brought about by the defendant for the purpose of cheating and defrauding these plaintiffs," as appears on lines 4, 5, 6, 7 and 8 of said paragraph, for the reason that said portion of said paragraph is inconsistent with the rest of said paragraph whereby plaintiffs deny that the said Ellamar Packing Company and Ray Grasser did take said property, and for the further reasons that said portion of said paragraph is irrelevant, redundant and frivolous, and for the further reason that said portion of said paragraph pleads conclusions of law and is highly prejudicial to the defendant.

Respectfully submitted this 4th day of June, 1949.

FAULKNER, BANFIELD & BOOCHEVER,
DAVIS & RENFREW,
Attorneys for Defendant,

By /s/ R. BOOCHEVER.

[Endorsed]: Filed June 4, 1949.
Receipt of copy acknowledged.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT, RESERVING RIGHT TO APPLY FOR NEW TRIAL IN THE EVENT THE MOTION IS DENIED

Comes now Columbia Lumber Company, Inc., a corporation, the above-named defendant, such party having heretofore moved that the Court direct a verdict in its favor at the close of plaintiffs' case and at the close of all the testimony received in the trial of the above-entitled cause, and such motion having been denied and a verdict having been returned by the jury in favor of the plaintiffs and against the defendant in the sum of Fourteen Thousand Ninety-two ($14,092.00) Dollars, and moves that a judgment be entered in favor of the defendant nothwithstanding the verdict, for the reason that, as will appear from all the records and files of this action and from the minutes of the Court, the pleadings and the evidence, and exhibits introduced by the respective parties, there was no substantial evidence upon which the plaintiffs were entitled to recover of and from the defendant, and there was no evidence upon which the matter should have been submitted to the jury, and for the reason that defendant's motion for a directed verdict in its favor should have been granted by the Court.

The defendant reserves the right, in the event its motion for judgment nothwithstanding the verdict be denied, to apply to the Court for a new trial.

Dated at Anchorage, Alaska, this 10th day of June, 1949.

FAULKNER, BANFIELD & BOOCHEVER,
J. L. McCARREY, JR.,
DAVIS & RENFREW,
Attorneys for Defendant.
By /s/ EDWARD V. DAVIS.

[Endorsed]: Filed June 10, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now Columbia Lumber Company, Inc., a corporation, the above-named defendant, by and through its attorneys, Faulkner, Banfield & Boochever, J. L. McCarrey, Jr., and Davis & Renfrew, and moves that the Court may set aside and vacate the verdict of the jury rendered in the above-entitled cause on the 8th day of June, 1949, and prays that a new trial may be granted to the defendant in such action for the following reasons:

1. The verdict as rendered is not supported by sufficient evidence but is contrary to the evidence.

2. The verdict as given is against the law.

3. The verdict as given is for excessive damages appearing to have been given under the influence of passion, prejudice or sympathy, and is far in ex-

cess of any amount which the plaintiffs might be entitled to recover under the evidence submitted in this cause, if in fact the plaintiffs are entitled to recover any sum at all.

4. Errors in law occurring at the trial and excepted to by the defendant in the following particulars:

(a) The Court erred in allowing over objection of the defendant testimony of alleged oral conversations which supposedly took place between one "Blackie" Lambert and plaintiff, Bruno Agostino, without any showing that the said Lambert had any authority to act for or on behalf of the defendant corporation or any authority to bind such company, and over objections of the defendant to the effect that testimony of oral conversations was a violation of the parol evidence rule and of the best evidence rule in view of the evidence of a written agreement made between the parties on or about June 29, 1948, covering the same subject matter as the alleged oral conversations.

(b) That the Court erred in refusing to strike the testimony concerning the alleged oral conversations above mentioned and in refusing to instruct the jury to disregard such testimony under the undisputed evidence of the execution of the written agreement of June 29, 1948, or thereabouts, and the undisputed testimony concerning the lack of authority of the witness Lambert.

(c) That the Court erred in allowing the admis-

sion of plaintiff's Exhibit No. 1 over objection of the defendant, for the reason that such exhibit did not tend to prove or disprove any of the issues of this case, and was incompetent, irrelevant and immaterial for any purpose and highly prejudicial to the defendant.

(d) That the Court erred in allowing plaintiffs to amend their complaint to set up a new cause of action after granting defendant's motion for a directed verdict at the close of plaintiffs' case, for the reason that there was no evidence sufficient to go to the jury admitted by the Court at the time the motion was made, and for the reason that under all the evidence no agreement had been reached between the parties on or about March 24, 1948, or at any time prior to June 29, 1948, and for the further reason that there was no evidence sufficient to allow an inference that the parties had made an agreement for sale of the property in question complete in all its terms except as to the purchase price, and there was no evidence before the Court which would justify a recovery against the defendant on the theory of quantum valebat.

(e) That the Court erred in allowing the trial to proceed under the Second Amended Complaint filed by plaintiffs after the close of plaintiffs' evidence, and after argument of defendant's motion for a directed verdict and the Court's ruling thereon.

(f) That the Court erred in denying defendant's motion for non-suit made after the Court had

ruled upon defendant's motion for a directed verdict.

(g) That the Court erred in refusing to grant defendant's motion to strike portions of plaintiffs' Second Amended Complaint and to require portions of such Second Amended Complaint to be made more definite and certain, the particular portions more fully appearing in defendant's motion to strike and to make more definite and certain.

(h) That the Court erred in denying defendant's motion to strike portions of plaintiffs' reply made to defendant's answer, such portions more fully appearing from the motion, for the reason that the matters asked to be stricken by the defendant were improper pleading and were highly prejudicial to defendant's defense in this action, and that the instruction given on the prejudicial matters in plaintiffs' reply did not cure the prejudicial matter contained in such reply in view of the fact that such instruction was not given until after argument was had by plaintiffs' attorney, particularly in view of the fact that plaintiffs' attorney argued to a great extent to the effect that the property was removed by the third parties by some sort of collusion or conspiracy between defendant and the third parties, and the instruction as given could not remove the effects of such argument in the minds of the jury.

(i) That the Court erred in its refusal to grant the renewal of defendant's motion for a directed

verdict and non-suit made at the close of the evidence, for the reason that there was no evidence to go to the jury at the close of the evidence even under the theory of quantum valebat, alleged in plaintiffs' Second Amended Complaint made during the course of the trial.

(j) That the Court erred in submitting the matter to the jury, in that there was not sufficient evidence to sustain a verdict for the plaintiffs concerning any agreement for sale or sale had between the plaintiffs and the defendant on or about March 24, 1948, under any theory advanced by the pleading under quantum valebat, or otherwise.

(k) That the Court erred in refusing to instruct the jury as a matter of law that the witness Lambert was an independent contractor from and after April 1, 1948, and that the said Lambert had no authority to bind the defendant to any sale or agreement for sale prior to April 1, 1948.

(l) That the Court erred in failing to instruct the jury that the written agreement entered into between the parties on or about June 29, 1948, together with the letter written by Thomas A. Morgan on behalf of the defendant on July 19, 1948, constituted a valid and existing agreement between the parties and binding upon the parties according to its terms, except as to plaintiffs' subsequent breach and repudiation thereof, and in failing to instruct the jury that any oral conversations had between the parties prior to the date of the written

agreement were merged in the written agreement.

(m) That the Court erred in failing to instruct the jury as requested in defendant's requested Instructions numbered I, II, III, IV, VI, VII, IX, X, XI, XII, XIII, XIV, XV, XVI (except insofar as covered by instructions of the Court as given), XVII, XVIII, XX, XXI, XXII, XXIV, XXVI (except insofar as covered by instructions of the Court as given), XXVII, XXVIII, XXIX, XXXI, the defendant having by proper exception objected to the ruling of the Court in its failure to give such requested instructions.

(n) That the Court erred in giving portions of Instruction No. 4 as follows:

(1) That portion of such instruction commencing with line 8 with the words "in case of land," and ending at the end of the first paragraph, for the reason that such instruction leaves out consideration of the statute of frauds and the inclusion of the statute of frauds in another place does not cure the defect.

(2) That portion of Instruction No. 4 consisting of the last paragraph of the first page of such instruction commencing with the word "in this case," and ending with the end of such paragraph, and Instruction No. 4 continued ending with the words "says there was not," for the reason that under the evidence of this case no agreement of sale was reached between the parties in any manner at all, and to allow the matter to go to the jury on the

theory that an agreement was reached in all respects except price, over proper objections made by the defendant, was improper, highly prejudicial to the defendant, and allowed the jury to speculate on the matter of price when, as a matter of law, defendant should not have been liable to the plaintiffs for any price at all.

(3) That portion of Instruction No. 4 continued, consisting of the last paragraph thereof, for the reason that on the basis of all the evidence the jury could not properly have found that the plaintiff sold and delivered anything to the defendant on or about March 24, 1948, or that the defendant accepted and took possession of any property at that time, and such instruction was given allowed the jury to deduce an implied agreement, where in fact the evidence does not support any implied agreement, and allowed the jury to speculate on the reasonable value of the property when, in fact, as will appear from the evidence, there was no agreement of sale or to sell, express or implied, for the reasonable value of the property or otherwise, and for the further reason that the instruction as given allowed the jury to speculate on what consituted possession without instructing the jury on the matters of possession, and allowed the jury to speculate that possession of unoccupied tidelands and of the waters of a navigable stream constituted taking possession of plaintiffs' property. That defendant, as will appear from exceptions taken in this matter, made timely objection and took proper exception

to the giving of the portions of such instruction to which objection is here made.

(o) That the Court erred in giving portions of Instruction No. 5 as follows:

That portion of Instruction No. 5 commencing on line 5 of such instruction with the words "the law in such cases," and continuing to the end of such instruction, for the reason that such instruction was not justified under the evidence of this case and does not correctly state the law as applicable to this case under the evidence introduced, and for the reason that the undisputed evidence shows that the plaintiffs were not using or occupying the portion of the tideland pond used and occupied by the witness Lambert in his logging operations, and for the reason that there is no evidence before the Court that the witness Lambert had any power or authority from the defendant to use or occupy any lands used or occupied by the plaintiffs, and that as will appear from all the evidence in this case, the witness Lambert in so using and occupying such lands was acting as an independent contractor and not as the agent or servant of the defendant corporation, and for the reason that such instruction allowed the jury to infer that use of a portion of the tideland pond by the independent contractor Lambert constituted a taking of possession of plaintiffs' property, including their logging camp and equipment, by the defendant corporation. Such instruction likewise failed to set forth that paramount title to the tidelands in question were in the

United States of America and did not instruct on the right of a person holding a permit from the United States of America to use and occupy such tidelands. Such instruction likewise failed to clearly set forth the rights of a person possessing tidelands to exclusive possession of such tidelands, and the instruction as given authorized the jury to find that the few hand driven piles placed in one portion of the pond by the plaintiffs constituted exclusive possession of the entire tideland pond, and in fact by using the word "pilings" in its instruction, the Court in effect instructed the jury that the plaintiffs by maintaining a few piles in one portion of the pond according to their evidence, had the superior right to the entire tideland pond in question. Defendant, as will appear from exceptions taken in this matter, made timely objection and took proper exception to the giving of such instruction.

(p) That the Court erred in giving the first portion of Instruction No. 5-A, for the reason that the jury could not properly have found under the evidence before them that plaintiffs and defendant entered into an oral agreement for the sale of plaintiffs' property on or about March 24, 1948, or that defendant accepted and received and took possession of said property as claimed in plaintiffs' Second Amended Complaint, and the jury could not properly have found that there was a sale and delivery of any property by the plaintiffs to the defendant or any acceptance and receipt of said property by the

defendant, and for the reason that there was no evidence on the points above mentioned to be submitted to the jury and that such instruction as given allowed the jury to speculate as to the existence of an agreement which, as a matter of law, was not made by the parties, and allowed the jury to speculate as to an amount of compensation not to exceed $25,000.00 to be paid by the defendant to plaintiffs where there was no evidence to justify the finding of any agreement or of any sale or of any acceptance of any property under an intention to buy, or of any money due from the defendant to plaintiffs. As to such instruction defendant, as will appear from the exceptions taken, made timely objection and took proper exceptions to the giving of the same.

(q) That the Court erred in giving that portion of Instruction No. 6-A, commencing on line 7 thereof with the words "as a matter of law," and ending in line 14 with the words "about March 24, 1948," for the reason that as a matter of law any oral conversations that may have been had between the parties was merged with the written agreement reached late in June or early July of 1948, and was as a matter of law a bar to the enforcement of any alleged oral agreement prior to that date. Defendant, as will appear from the exceptions taken in this matter, made timely objection and took proper exception to such portion of such instruction.

(r) That the Court erred in giving Instruction No. 6-D, for the reason that on the undisputed evidence Kenneth Lambert was an independent contractor after April 1, 1948, and the Court should have instructed the jury as a matter of law that Lambert was such independent contractor and that any actions taken by Lambert in taking possession of any of plaintiffs' property after April 1, 1948, were the acts of Lambert and not the acts of the defendant corporation, and were not binding on the defendant corporation, and for the reason that there was no question properly to be submitted to the jury in connection with the subject matter of Instruction No. 6-D. That as will appear from the exceptions taken in this matter, defendant made timely objection to such instruction and took proper exception thereto.

Wherefore, defendant prays that the verdict of the jury in the above-entitled matter may be set aside and held for naught, and that defendant may be granted a new trial in the matter.

Dated at Anchorage, Alaska, this 13th day of June, 1949.

FAULKNER, BANFIELD &
BOOCHEVER,
J. L. McCARREY, JR.,
DAVIS & RENFREW,
Attorneys for Defendant,
By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed June 16, 1949.

DEFENDANTS' REQUESTED INSTRUCTIONS

Instruction No. XIV.

The evidence shows that Kenneth D. Lambert (also referred to in this case as "Blackie" Lambert) was an independent logging contractor from and after April 1, 1948. You are therefore instructed that his actions after that date are not binding on the defendant unless expressly authorized by an officer of the defendant empowered to authorize such action, or unless his actions were subsequently ratified by such an officer of the defendant company.

It also appears that prior to April 1, 1948, Kenneth D. Lambert was not employed by the defendant company in such capacity that he was empowered to make purchases or to enter into contracts for the defendant company, or to bind the defendant company in any agreements. Thus, unless you find that the witness Lambert had express authority from the officer of the defendant company empowered to grant such authority to make a purchase or to contract for the defendant company, any statements made by him, if any were made for such a purpose, must be disregarded.

Refused except as covered by instructions given. Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

Instruction No. XVIII.

If you find that some of the property was taken into the possession of the defendant under the terms of a proposed contract of sale and that later the proposed contract of sale was abandoned by the parties, and if you further find that upon such abandonment the property previously taken into possession of the defendant was returned by the defendant to the place from which it had been taken, then you must not find for the plaintiff as to such property.

Refused except as covered by instructions given. Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XIX

You are instructed that a contract to sell or a sale of any goods or choses in action of a value of $500.00 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

In the subject case there is no evidence of a note or memorandum in writing which has been

introduced other than the contract dated July 29, 1948 and signed by the parties. The plaintiff, however, is not suing on that contract. There is no evidence in this case of a part payment. Thus, unless you find that on or about March 24, 1948 the Columbia Lumber Company, through its authorized agents, accepted part of the goods contracted to be sold and actually received, you must disregard any alleged oral contract of sale, or oral sale allegedly made on or about March 4, 1948.

Sec. 29-1-12, Alaska Compiled Laws Annotated, 1949; 49 Am. Jur. Secs. 607, 608.

Refused except as covered by instructions given. Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XX

You are instructed that there is testimony in this case concerning a certain pond near the mouth of Mosquito Creek, and that the area covered by the pond is tideland. Title to tideland is in the United States of America. Individuals, partnerships or corporations can acquire possessory rights to use tidelands and may erect useful improvements thereon and use and occupy the same subject only to the paramount rights of the United States in such tidelands, but tidelands unoccupied by any person, firm or corporation may be occupied by any other person,

firm or corporation, subject again only to the paramount rights of the United States of America. As applied to the case here under consideration, you are instructed that if you find that the defendant corporation, or its agents, on or about March 24, 1948, occupied a portion of the area covered by the pond above mentioned and that the area occupied by the defendant, or its agents, was not at that time covered by any useful improvements belonging to the plaintiffs, such occupancy by the defendant, or its agents, would not constitute a taking of possession of any of plaintiffs' property. You are further instructed that the belief of the plaintiff, Agostino, if he had such belief, that he had the exclusive right to possession of the tideland pond above mentioned, is immaterial, and you are instructed that the plaintiff, Agostino, had an exclusive possessory right to use only such portion of the pond, if any, which was actually occupied by useful improvements constructed or placed in such pond by the plaintiffs, or their agents, or their predecessors in interest.

Refused except as covered by instructions given. Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXI

An alleged written contract has been introduced into evidence, by the terms of which document the

plaintiff, Bruno Agostino, agreed to sell all the property at Barry Arm Camp to the defendant for the sum of $10,000.00, $3,300.00 of which was to be paid to the Clerk of the Court pending the outcome of a claim against part of the property involved. There is conflicting testimony as to the reason why this contract was not completely performed. Regardless of the validity of the contract, however, you may consider its provisions in determining the value of plaintiffs' property in the event that you should decide that the plaintiffs are entitled to any damages.

Refused except as covered by instructions given. Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXIV

Evidence has been introduced in this case to the effect that the witness Kenneth B. Lambert borrowed six barrels of oil and one and a half barrels of gasoline from the plaintiffs. No testimony has been presented as to whether said barrels of oil and gasoline were returned. The evidence indicates, however, that Mr. Lambert at the time that he borrowed said barrels of oil and gasoline was an independent contractor, and unless you find that he was expressly authorized by a duly empowered officer of the defendant company to borrow such

barrels of oil and gasoline, his actions in that connection are not binding on the defendant and defendant is not liable for any damages sustained by the plaintiffs, if any were sustained, as a result of the borrowing of such barrels of oil and gas. You are further instructed that no evidence has been introduced to the effect that defendant ever authorized the witness Lambert to borrow such barrels of gasoline and oil, or that such action of Mr. Lambert was ever ratified by the defendant.

Refused except as covered by instructions given. Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXVI

Plaintiffs allege in their complaint that on or about the 24th day of March, 1948, the plaintiffs sold to the defendant and gave to the defendant, at its request, certain property and equipment located at Barry Arm. You are instructed that the evidence does not establish a contract of sale of this property between the parties on or about March 24th. The plaintiffs have the burden of proving that they gave to the defendant at the defendant's request, and that the defendant took possession of said property on or about March 24, 1948. In this connection you are further instructed that defendant had the right to use unoccupied tidelands and unoccupied portions

of the public domain, and possession of such areas does not constitute evidence of any sale.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXVII

You are instructed that under the laws of the Territory of Alaska, only the real party in interest is entitled to bring a suit. In this case plaintiffs allege that they sold a certain D-8 caterpillar tractor to the defendant on or about March 24, 1948. In determining the truth of that allegation, you may consider the fact that plaintiffs have filed a Third Amended Complaint against the Ellamar Packing Company asking the court to declare the plaintiffs to be the present owners of what appears to be the same tractor. Plaintiffs would not be entitled to bring such a suit against Ellamar Packing Company had they previously sold the tractor to the Columbia Lumber Company.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXVIII

Defendant in its Answer and Counterclaim to plaintiffs' Second Amended Complaint, alleges in part in Paragraph IV thereof:

"In that connection, as defendant is informed and believes, and so alleges the fact to be, that certain of the property described in Paragraph IV of plaintiffs' Second Amended Complaint belonged to third parties, and has since been repossessed and taken from the premises by such third parties, to-wit:

1 donkey engine and cables

1 D-8 caterpillar tractor

1 D-7 caterpillar tractor."

The plaintiffs in their reply deny that part of the property belonged to third parties, but by failing to deny the remainder of that portion of defendant's answer, plaintiffs admit that the donkey engine and cable, one D-8 caterpillar tractor and one D-7 caterpillar tractor have since been taken from the premises by third parties.

Refused except as covered by instructions given. Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXIX

Each party to this action claims to be entitled to damages from the other, the plaintiffs under their

Second Amended Complaint, and the defendant under its Counterclaim. The burden is on each party to prove by a preponderance of the evidence that they *or is* entitled to damages.

The issues to be determined by you are:

First: Did a sale take place on or about March 24, 1948, whereby the plaintiffs sold the property owned by them at Barry Arm to the defendant, gave said property to the defendant at its request, and did the defendant on or about March 24, 1948 take possession of property of the plaintiffs?

If you so find, you must find for the plaintiffs and assess damages in accordance with the provisions of the other instructions which shall be given you.

Second: Was an oral contract of sale, subsequently reduced to writing, entered into on or about June 29, 1948, whereby the plaintiffs, through one of its partners, Bruno Agostino, agreed to sell all of their property at Barry Arm to the defendant for the price of $10,000.00?

If you answer the second question in the affirmative, you may not find for the plaintiffs, since such a contract would be inconsistent with a sale of the same property having been consummated on or about March 24, 1948.

Third: If you answer the second question in the affirmative, you must then decide whether or not the plaintiffs failed to go through with such agreement or repudiated such agreement by refusing to furnish a list of equipment, if such a list was required by

said agreement, or by refusing to include in the property to be conveyed one cabin, or by failure to have good title to part of the property agreed to be conveyed without having notified defendant of the fact prior to the date of the agreement.

If there was such a repudiation or breach of the agreement by the plaintiffs in any of the manners above set forth, you are instructed that damages cannot be assessed against the defendant if you find that defendant returned the property to the place from which it had been removed, and in such event you are further instructed that the defendant is entitled to damages from the plaintiffs for any loss suffered by the defendant as a result of such a breach of contract.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters

at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

3.

The plaintiffs in this case, Bruno Agostino and Stanley Socha, co-partners doing business under the firm name and style of Barry Arm Camp, by their second amended complaint filed in this action after the commencement of the trial thereof, claim that on or about March 24, 1948, the plaintiffs were the owners of certain property situated in the vicinity of Mosquito Creek, Prince William Sound, Territory of Alaska, of the reasonable value of $37,-412.00, and that on or about said date the plaintiffs

sold all of said property to the defendant and gave to the defendant at its request possession of all of said property and that thereby the defendant became indebted to the plaintiffs and obligated to pay the plaintiffs for said property the reasonable value thereof; that the defendant did take the property and now retains the same and has failed, neglected and refused to pay the plaintiffs therefor and has paid nothing to the plaintiffs for the property; that by reason thereof the defendant is justly indebted to the plaintiffs in the sum of $37,412.00, but that plaintiffs seek to recover only the sum of $25,-000.00; that demand for payment has been made but that defendant has failed, neglected and refused to pay the said sum of $25,000.00, or any part thereof and that all of said sum is now due and owing from defendant to plaintiff.

The defendant, Columbia Lumber Company, Inc., by its answer to the plaintiffs' second amended complaint, denies most of the averments thereof, specifically denies that the value set opposite the various items of property listed in the second amended complaint were or are the reasonable value of such items, denies that such property in the aggregate was of the reasonable value of $37,412.00, or any sum at all in excess of $9,000.00 for all of the property owned by plaintiffs or claimed by them at the time and place in question; and upon information and belief defendant alleges that certain of the property listed in the second amended complaint belonged to third parties and has been repossessed

and taken from the premises by such third parties, that property consisting of 1 donkey engine and cables, 1 D-8 Caterpillar tractor and 1 D-7 Caterpillar tractor; denies that plaintiffs sold to the defendant the property described in said second amended complaint and denies that plaintiffs gave to the defendant at its request possession of all or any of said property and denies that defendant thereby became indebted to the plaintiffs and obligated to pay to the plaintiffs for said property the reasonable value thereof.

For affirmative defenses to the plaintiffs' second amended complaint, the defendant in its answer thereto alleges that on or about the last day of June, 1948 the defendant made an oral agreement with the plaintiff, Bruno Agostino, by the terms of which defendant agreed to purchase and plaintiff, Bruno Agostino, agreed to sell all of the equipment, buildings and property claimed by the plaintiffs and located at the place known as Barry Arm Camp fror an agreed price of $10,000.00 to be paid in the mode and manner stated in said answer; that on or about July 2, 1948 the oral agreement for the sale and purchase of said property was reduced to writing and was signed and acknowledged by plaintiff, Bruno Agostino; that thereafter said agreement was executed on behalf of the defendant by its President, Thomas A. Morgan, and provisions made for payments called for under said agreement; that plaintiff, Bruno Agostino, thereafter refused to consummate said agreement but in the meantime

the defendant had expended in excess of $2,000.00 in labor and materials for repairing the tractors covered by said agreement; that defendant did not take possession of the sawmill or donkey engine or any of the other equipment which palintiff had agreed to sell to defendant except the tractors and the bunkhouse; that said tractors were thereafter returned to the plaintiffs and one of them was repossessed by its alleged owner, Ellamar Packing Company, under the provisions of a conditional sales contract; and upon information and belief defendant alleges that the donkey engine and the other Caterpillar tractor were taken from the premises on or about September 25, 1948 by one, Raymond Grasser, under some sort of claim of onwership by said Raymond Grasser; that defendant does not have possession of any of plaintiffs' property or equipment and never had possession of any part thereof except as to the bunkhouse and tractors mentioned and such property was returned by defendant to plaintiffs' premises on or about September 1, 1948; that plaintiffs had no title at any time to the RD-8 Caterpillar tractor included in the alleged written contract of July 2nd, 1948 but such tractor was owned by Ellamar Packing Company which thereafter repossessed the tractor and took it away from the Barry Arm Camp; that defendant at all times has been ready, willing and able to perform the agreement of July 2, 1948 but was prevented from so performing by the breach of such agreement and its repudiation by plaintiff Bruno Agostino; that the

plaintiffs were unjustifiably enriched in the sum of $2,000.00 represented by the value of the materials and labor expended on the tractors above described by defendant in alleged reliance upon plaintiff's agreement made on or about the last day of June, 1948.

The plaintiffs in their reply to said answer, deny most of the averments thereof inconsistant with the plaintiffs' second amended complaint; plaintiffs admit that in June or July, 1948, the defendant did enter into a compromise agreement with plaintiff Agostino by which the defendant offered to pay and plaintiff Agostino offered to settle for the sum of $10,000.00, with an understanding that $3,300.00, of such sum was to be deposited with the Clerk of the Court pending settlement of the dispute as to title to some of the property in question between plaintiff Agostino and one Ray Grasser; plaintiffs admit that the agreement was to be reduced to writing by Harold J. Butcher and that it was reduced to writing and was signed by plaintiff Agostino; plaintiffs allege that the defendant failed, neglected and refused to go through with said agreement.

When you retire to consider of your verdict you will take with you to the jury room the plaintiffs' second amended complaint, the defendant's answer thereto and the plaintiffs reply to said answer and you may there carefully read and consider said pleadings and determine the precise nature of conflicting claims and statements of plaintiffs and defendant.

Under our practice the defendant is not permitted to respond by further pleading to any new and affirmative matter contained in the plaintiffs' reply, but as a matter of law all such new and affirmative matter which is not in harmony with the defendant's answer is considered denied by the defendant with the same force and effect as though a verified denial of such affirmative matter were made and filed by defendant.

3-A.

The plaintiffs have alleged in their second amended complaint that the contract upon which they rely for the sale of the property to the defendant and the delivery of the property to the defendant was made on or about March 24, 1948. The exact date upon which the contract was made, if any was made, is immaterial provided it was made at all within a reasonable time before or after March 24, 1948. However, the words "on or about" do not put the time at large, but indicate that the date is stated with approximate certainty. "On or about" means the day mentioned or one in close proximity thereto, within the range of several days before or after, and not a variation of three or more months.

3-B.

In this case, as in all civil cases, the burden is upon the plaintiffs to prove their case by a preponderance of the evidence only, and not, as in criminal cases, beyond reasonable doubt. Prepon-

derance of evidence means the greater weight of evidence. If the evidence in your mind is equally balanced as between the plaintiffs and defendant, then the verdict should be for the defendant, because the burden is upon the plaintiffs to present evidence of greater weight than that in favor of the defendant before plaintiffs are entitled to recover.

As indicated the plaintiffs are required to prove all the elements of their second amended complaint by the greater weight of evidence, and if they have not so proved those elements, or if the evidence is evenly balanced so that you are unable to say on which side is the greater weight of the evidence, or if the greater weight of the evidence is in favor of the defendant, then in any such event the plaintiffs cannot recover from the defendant.

Similarly, the defendant is required to prove all the elements of its counterclaim by the greater weight of the evidence, and if it has not so proved those elements, or if the evidence is evenly balanced so that you are unable to say on which side is the greater weight of the evidence, or if the greater weight of the evidence is in favor of the plaintiffs, then in any such event the defendant cannot recover from the plaintiff.

4.

During the course of the trial use has been made of the word "contract." A contract is frequently called an agreement. A contract is an agreement

between two or more persons to do or not to do some specific thing. Every sale and purchase of property are the result of a contract, the seller agreeing to sell and the purchaser to buy the property. In case of land, such contracts are ordinarily put in writing. Contracts for sale and purchase of personal property are sometimes put in writing, but not always. An oral contract for the sale of personal property may in law, if proved, be just as valid and enforceable as though it were written.

Contracts are of two general classes, express and implied. Express contracts are those in which the terms of the contract are openly and fully uttered and avowed at the time of making, such as to pay a stated price for certain specified goods or property. A contract is implied where there was not an express contract, but where there is circumstantial evidence otherwise that the parties did intend to make a contract. For instance, if one orders goods of a tradesman or employs a man to work for him, without the price or wages having been agreed upon in advance, the law raises an implied contract to pay the value of the goods or services.

In this case there is not sufficient evidence to show an express agreement between plaintiffs and defendant as to the price of the property which the plaintiffs claim to have sold and given into possession of defendant, and therefore as a matter of law there was no express contract between the parties. The question for your determination is, was there and implied contract, arising from

the circumstances of the case obligating the defendant to pay plaintiffs the reasonable value of the property. The plaintiffs say there was such an implied contract; the defendant says there was not.

So in this case if you find from all of the evidence and by a preponderance thereof, and under these instructions as to the law, that the plaintiffs on or about March 24, 1948, sold and delivered the property in question to the defendant and the defendant accepted said property and took possession thereof, the law implies a promise on the part of the defendant to pay the reasonable value of the property, that reasonable value to be determined by you from the evidence in the case, but in no event to exceed $25,000.00.

5.

It appears that the property with which this action is concerned, referred to in the testimony and in these instructions as the Barry Arm property, was situated upon public domain. The law in such cases provides that one in possession of public land and making lawful use of the same is entitled to the possession of such property against all other persons who may seek to take possession thereof.

That rule applies not only to land above high tide but also to tide lands which are dry at low tide but covered by water at high tide. If you find in this case that the plaintiffs were in actual possession and use of any tide lands, then and in that event they were entitled to maintain possession

thereof as against all other claims or claimants seeking possession of such tide lands from the plaintiffs. Beyond and below the low tide mark and thence extending seaward, the rule is in most cases otherwise. As to the sea and arms and inlets of the sea below the low tide mark and thence extending seaward, and as to lands underlying the sea below the low tide line, as a general rule all persons have equal right to the lawful use thereof.

Hence, the plaintiffs had the lawful right to keep and maintain possession of the lands and tide lands possessed by them on and prior to March 24, 1948; and likewise the defendant had and has the lawful right to use unoccupied portions of the public domain and unoccupied tide lands, and possession of such areas by the defendant does not constitute any evidence of sale.

It should be noted that as respects tidelands, actual possession is necessary to establish superior right. Without actual possession all persons enjoy equal right to use thereof. Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings. But exclusive uninterrupted and long continued possession and use for other purposes may give such superior right, provided there is real and actual possession. But occasional use or even actual but temporary possession does not establish any special right other than that enjoyed by all citizens. Moreover, the possession of tidelands, in order to be valid, must be such as not to interfere with navigation or run counter to the laws relative to the fisheries.

5-A.

If you find from a preponderance of the evidence that the plaintiffs and defendant entered into an oral contract for the sale by the plaintiffs of the property in question to the defendant, and the purchase of the property by the defendant from the plaintiffs on or about March 24, 1948, and that the defendant thereupon accepted and received and took possession of said property, substantially as claimed in the plaintiffs' second amended complaint, and that there was there a sale and delivery of said property by the plaintiffs to the defendant and acceptance and receipt of said property by the defendant, then it is your duty to return a verdict in favor of the plaintiffs and against the defendant for the reasonable value of the property in such sum as you find the plaintiffs justly entitled to receive under the evidence given in this case, and under these instructions as to the law, but in no event to exceed the sum of $25,000.00, which is the sum claimed by the plaintiffs to have been due them from the defendant.

But if the plaintiffs have failed to prove all and each part of their case as above outlined by a preponderance of the evidence, then it is equally your duty to bring in a verdict in favor of the defendant and against the plaintiffs, and you should consider whether or not the defendant is entitled to recover from the plaintiffs on the defendant's counterclaim; and if you find that the defendant has proved its counterclaim by a preponderance of

the evidence, you should return a verdict in favor of the defendant and against the plaintiffs accordingly.

6.

The laws of Alaska concerning sales of personal property provide in part as follows:

"A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

In this case there is no evidence of a note or memorandum in writing other than the agreement which was signed by the plaintiff Agostino in the latter part of June or the early part of July, 1948, and thereafter signed by Thomas A. Morgan as president of the defendant corporation. However the plaintiffs are not suing on that agreement. There is no evidence in this case that part payment of the property was made. Therefore, unless you find that on or about March 24, 1948, the defendant through its authorized agent or agents accepted part of the goods contracted to be sold and actually received the same, the plaintiffs are not entitled to recover in this action.

Under the laws of Alaska, the seller of personal

property warrants the title of the property sold unless other provision is made in the contract of sale. The law on the subject, so far as relevant to this case, reads as follows:

"In a contract of sale, unless a contrary intention appears, there is—

(1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of sale;

(3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract of sale is made."

* * *

"Where there is a breach of warranty by the seller, the buyer may, at his election— * * *

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. * * *

(4) (Liability for price or repayment.) Where

the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. * * *

(6) (Measure of damages.) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."

If you find from a preponderance of the evidence that the plaintiffs sold and delivered the Barry Arm property to the defendant on or about March 24, 1948, and that defendant then accepted and received said property or some part thereof, and if you further find that there was a breach of warranty by the sellers of said property, that is to say, by the plaintiffs in this action, under any of the provisions of the law above quoted whereby the plaintiffs warranted that they had then the right to sell the property, warranted that the buyer should have and enjoy quiet possession of the property, warranted that the property at the time of sale was free of any charge or encumbrance in favor of any third person not declared or known to the buyer at or before the date of the alleged sale, then the plaintiffs are liable to the defendant for the loss directly and naturally resulting in the ordinary course of events from such breach of warranty, and such loss, if any, should be deducted from the amount, if any, which you find the plaintiffs otherwise entitled to recover from the defendant in this action.

6-A.

Evidence has been received showing that in the latter part of June or the early part of July, 1948, the plaintiff Agostino signed an agreement for the sale of the property in question to the defendant, and that at some later date the agreement was signed by Thomas A. Morgan on behalf of the defendant corporation and as president thereof. As a matter of law, the evidence concerning the written agreement of late June or early July, 1948, and what transpired before and after with respect to said agreement, is not sufficient to constitute a bar to the enforcement of the alleged oral agreement, if any there was, for the sale of the Barry Arm property, which plaintiffs assert was entered into on or about March 24, 1948. But you may and should consider all of the evidence concerning said written agreement, and concerning the preceding discussions and negotiations and what followed thereafter, as bearing on the issue for your decision, and that is, whether or not on or about March 24, 1948, the plaintiffs sold and delivered the Barry Arm property to the defendant and the defendant accepted and received possession thereof. Regardless of the validity of the written contract of late June or early July, 1948, you may take all of the evidence concerning it into consideration in determining whether or not the plaintiff Agostino considered that he had sold the Barry Arm property to the defendant on or about March 24, 1948, as alleged in the plaintiffs' second amended complaint.

6-B.

If you find that the defendant in July or August, 1948, took possession of some of the Barry Arm property under and in reliance upon the written agreement which according to the testimony was signed by the plaintiff Agostino in late June or early July, 1948, and thereafter for the reasons and under the circumstances disclosed in the testimony given during trial of the case, returned the property to the place from which it was taken at the Barry Arm camp, such possession of the property by the defendant at that time can not rightly be deemed acceptance and receipt of said property by the defendant under the alleged oral contract for sale and purchase of the Barry Arm property which the plaintiffs claim was entered into on or about March 24, 1948.

6-C.

The plaintiff Bruno Agostino in his testimony referred to Kenneth D. Lambert as the superintendent of the logging operations of the defendant and as the foreman for the defendant. This testimony was evidently based upon hearsay and is now ordered stricken and you should not consider such testimony of the plaintiff Agostino as to the authority or position of Lambert for any purpose whatever.

The testimony of said Kenneth D. Lambert as to his relations with the defendant was properly given

and admitted in evidence and you may give such consideration to that testimony as you believe it is justly entitled to receive.

6-D.

Testimony has been received as to the status of Kenneth D. Lambert, sometimes referred to as Blackie Lambert, with respect to the defendant corporation. The defendant claims that from and after April 2, 1948, the said Kenneth D. Lambert was an independent logging contractor and was not an employee of the defendant and had no authority to speak for or represent the defendant in any manner whatsoever. An independent contractor unless specially authorized has no authority to bind the person, firm or corporation with whom he has contracted to furnish material or logs or any other goods or merchandise or to do any type of work. If you find that Lambert was an independent contractor during the period mentioned or any part thereof, then and in that event unless Lambert had express authority from the defendant to act for and in behalf of the defendant, the statements or promises of Lambert made while he was an independent contractor would not bind the defendant in any manner.

You are instructed that an independent contractor is one who, in exercising an independent employment, contracts to do certain work according to his own methods and without being subject to the control of his employer except as to the product or result of his work. One who contracts to do a

specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas, or according to a plan previously given to him by the person for whom the work is done with respect to details of the work, is an independent contractor. An independent contractor may be described as one who contracts to perform a piece of work at his own risk and cost, the workmen being his servants, being hired and fired by him. When the employer points out the end to be attained but not how it shall be done or who is to do it, the person undertaking to do the work is an independent contractor.

6-E.

Smetimes, in the trial of actions attempt is made to "impeach" a witness, or the witness is said to be "impeached." Impeach means to bring or throw discredit on, to call into question, to challenge. Hence a witness may be said to have been impeached when his testimony is discredited or his veracity challenged.

One way of impeaching a witness is by showing that the witness has made different and contradictory statements on the same point on another occasion. If it appears from the evidence that any witness has been impeached in this manner, you have a right to take that circumstance into consideration in determining his credibility and the weight of his testimony.

6-F.

Certain pleadings in two other actions brought in this Court have been introduced in evidence in this case. Such pleadings do not constitute evidence of the truth of the facts therein alleged, but you may take into consideration, in reaching your verdict, any admissions, if any, made by the plaintiffs in this action in those pleadings, or any allegations, if any, made in those pleadings by plaintiffs which are contrary to plaintiffs' evidence here produced.

6-G.

Plaintiffs in their reply allege "that if the Ellamar Packing Co. and the said Ray Grasser did take any of the property claimed to have been sold by the plaintiffs to the defendant, that the same was taken through a scheme and conspiracy brought about by the defendant for the purpose of cheating or defrauding these plaintiffs."

No evidence has been introduced in this case from which such an inference could reasonably be made and therefore, as a matter of law, you are instructed to disregard the above quoted portion of plaintiffs' reply.

7.

The laws of Alaska provide that all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and

all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you may believe to be errors of law upon the part of he Court.

All questions of fact, other than those heretofore mentioned in these instructions, must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

8.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

9.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the

amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

10.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel so far as the same are based upon the evidence which you have heard and the proper deductions therefrom and the law as given to you by the Court in these instructions. But arguments of counsel if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

11.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case,

in order to agree with other jurors, it is nevertheless the duty of every juror, in considering the case with fellow jurors, to lay aside all undue pride or vanity of personal judgment, and to consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict; and to that end no juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

12.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

13.

Upon retiring to the jury room to consider your verdict, you will elect one of your number foreman who will speak for you and date and sign the verdict unanimously agreed upon. When you so retire you will take with you the pleadings in the case consisting of the plaintiffs' second amended complaint, the defendant's answer thereto, the plaintiffs' reply to the answer, the exhibits, these instructions and two forms of verdict.

If you find for the plaintiffs and against the defendant, you should use the form of verdict which has been prepared for that contingency and which is marked Verdict No. 1, and your foreman will insert therein the amount which you find the plaintiffs are entitled to recover from the defendant. The verdict should then be dated and signed by your foreman and returned into the Court as your verdict.

If you find for the defendant and against the plaintiffs, you will use the verdict which has been prepared for that contingency and which is marked Verdict No. 2, and your foreman will insert therein the amount, if any, which you find the defendant is entitled to recover from the plaintiffs, and your foreman will thereupon date and sign the same and you will return the same into Court as your verdict.

The verdict not used should be destroyed by your foreman.

You will return into Court with your verdict the pleadings, the exhibits and these instructions.

Dated at Anchorage, Alaska, this 7th day of June, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed July 6, 1949.

In the District Court for the Territory of Alaska, Third Division
A-5207

BRUNO AGOSTINO and STANLEY SOCHA, Co-partners Doing Business Under the Firm Name and Style of BARRY ARM CAMP,
Plaintiffs,

vs.

COLUMBIA LUMBER COMPANY, INC., a Corporation,
Defendant.

JUDGMENT

This cause having come on regularly for trial on the 31st day of May, 1949, the plaintiffs, Bruno Agostino and Stanley Socha, co-partners, doing business as Barry Arm Camp, plaintiffs, appeared in person and by their attorneys, Herman H. Ross and Bailey E. Bell, and the defendant, Columbia Lumber Company, Inc., a corporation, appeared by its president, Thomas Morgan, and by its attorneys of record, Robert Boochever and Edward V. Davis, each parties announced ready for trial, a jury was duly impaneled and sworn to try the issues in the

above-entitled case, and a true verdict render, the case being on trial until the 8th day of June, 1949, and all evidence having been adduced and submitted on behalf of both plaintiffs and defendant, and after argument by attorneys having been made, by the respective attorneys of the plaintiffs and the defendant, and the Court having instructed the jury as to the law; the said jury after due consideration, returned into Court, its verdict on the 8th day of June, 1949, which verdict is in words and figures, as follows, to wit:

In the District Court for the Territory
of Alaska, Third Division
No. A-5207

BRUNO AGOSTINO and STANLEY SOCHA, Co-partners Doing Business Under the Firm Name and Style of BARRY ARM CAMP,
Plaintiffs,

vs.

COLUMBIA LUMBER COMPANY, INC., a Corporation,
Defendant.

Filed in the District Court, Territory of Alaska, Third Division, June 8, 1949. M. E. S. Brunelle, Clerk, By Louise Strahorn, Deputy.

Verdict No. 1

We the jury duly impaneled and sworn to try the

above-entitled cause do find for the plaintiffs and against the defendant and find that the plaintiffs are entitled to recover of and from the defendant the sum of Fourteen thousand ninety two dollars ($14,092.00).

Dated at Anchorage, Alaska, this 8th day of June, 1949.

/s/ GEORGE KAROBELNIKOFF,
Foreman.

Entered Journal #G19, page #111, June 8, 1949.

Now, Therefore, after having heard and overruled the Motion for a New Trial, and on Motion of Bailey E. Bell of attorneys for the plaintiffs,

It Is Hereby Ordered and Adjudged, that the plaintiffs have judgment against the defendant in the sum of fourteen thousand and ninety two dollars ($14,092.00) as principal, together with interest thereon at the rate of six per cent (6%), per annum, from the 24th day of March, 1948, which amounts to, at this time, one thousand one hundred twenty seven dollars and thirty six cents ($1127.36), or a total of fifteen thousand two hundred nineteen dollars and thirty-six cents, ($15,219.36), together with a reasonable attorneys' fee, allowed and set by the Court in the sum of $250.00, and for all costs and disbursements herein to be taxed by the Clerk of the Court, in the sum of $.........., for all of which, let execution issue.

Dated at Anchorage, Alaska, this 22 day of July, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered July 22, 1949.

Service of copy acknowledged.

[Endorsed]: Filed July 22, 1949.

CERTIFIED COPY

United States of America,
Third District of Alaska—ss.

I, M. E. S. Brunelle, Clerk of the United States District Court in and for the Third District of Alaska, do hereby certify that the annexed and foregoing is a true and full copy of the original Judgment, in cause No. A-5207, entitled Bruno Agostino and Stanley Socha, Co-partners doing business under the firm name and style of Barry Arm Camp, plaintiffs vs. Columbia Lumber Company, Inc., a Corporation, defendant, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Anchorage, Alaska, this 8th day of November, A.D., 1949.

M. E. S. BRUNELLE,
Clerk.

[Seal] By /s/ KATHRYN HOFF,
Deputy Clerk.

[Endorsed]: Filed Nov. 22, 1949.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That we, the undersigned, Columbia Lumber Company of Alaska, a corporation, as Principal, and Thomas A. Morgan, of Juneau, Alaska, and Harold L. Bliss, of Anchorage, Alaska, as Sureties, hereby acknowledge ourselves to be indebted and firmly bound to Bruno Agostino and Stanley Socha, doing business as Barry Arm Camp, plaintiffs hereinabove named, in the sum of Sixteen Thousand ($16,000.00) Dollars, lawful money of the United States of America, for the payment of which sum well and truly to be made we bind ourselves, our heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and executed by the Columbia Lumber Company of Alaska, Principal, by Thomas A. Morgan, President, and by Thomas A. Morgan, individually, as one of the Sureties, at Juneau, Alaska, this 22nd day of August, 1949.

Signed, sealed and executed by Harold L. Bliss, one of the Sureties, at Anchorage, Alaska, this 29th day of August, 1949.

The condition of this obligation is such that,

Whereas, the Columbia Lumber Company of Alaska, a corporation, is appealing to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment rendered, made and entered in the above-entitled Court and cause

on the 22nd day of July, 1949, wherein and whereby it is ordered, adjudged and decreed that Bruno Agostino and Stanley Socha, doing business as the Barry Arm Camp, plaintiffs above-named, have and recover from the defendant, Columbia Lumber Company of Alaska, a corporation, the sum of $14,092.00, and the further sum of $250.00 as attorneys' fees, together with costs.

Now, Therefore, if the said Columbia Lumber Company of Alaska, a corporation, shall prosecute its appeal to effect and shall pay the judgment in full, together with costs, interests and damages for delay, or for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of judgment and such costs, interests and damages as the Appellate Court may adjudge and award, then this obligation to be void, otherwise to be and remain in full force and effect and to be enforceable against the above bounden sureties under and in accordance with the provisions of Rule 73 of the Federal Rules of Civil Procedure.

In Witness Whereof, the parties hereto have hereunto set their hands and seals on the dates hereinabove set forth.

COLUMBIA LUMBER
COMPANY OF ALASKA,
A Corporation, Principal.
By /s/ THOS. A. MORGAN,
President.

[Seal] /s/ THOS. A. MORGAN,
Surety.

[Seal] /s/ HAROLD L. BLISS,
Surety.

United States of America,
Territory of Alaska—ss.

I, Thomas A. Morgan, the undersigned, whose name is subscribed to the foregoing bond as surety, being first duly sworn, depose and say:

That I am a resident of the Juneau Precinct, Territory of Alaska, and that I am not an attorney nor counsellor at law, Clerk of any Court, Marshal, Deputy Marshal, or other officer of any Court, and that I am worth the sum of Sixteen Thousand ($16,000.00) Dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

/s/ THOS. A. MORGAN.

Subscribed and sworn to before me this 22nd day of August, 1949.

[Seal] /s/ S. P. FREEMAN,
Notary Public in and for Alaska.

My commission expires: 4-26-53.

United States of America,
Territory of Alaska—ss.

I, Harold L. Bliss, the undersigned, whose name is subscribed to the foregoing bond as Surety, being first duly sworn, depose and say:

That I am a resident of the Anchorage Precinct, Territory of Alaska, and that I am not an attorney nor counsellor at law, Clerk of any Court, Marshal, Deputy Marshal, or other officer of any Court, and that I am worth the sum of Sixteen Thousand ($16,-000.00) Dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

/s/ HAROLD L. BLISS.

Subscribed and sworn to before me this 29th day of August, 1949.

[Seal] /s/ J. L. McCARREY, JR.,
Notary Public in and for Alaska.

My commission expires 4-25-50.

Received but not yet approved by plaintiffs, this 31st day of August, 1949.

/s/ HERMAN H. ROSS,
Of Counsel for Plaintiffs.

ORDER

Now on this day, it is hereby ordered that the foregoing bond on appeal be and it is approved as to amount and sufficiency of surety; and

It is further ordered that said bond shall operate as a supersedeas bond from the date of the filing thereof herein.

Done in open Court this 12th day of August, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed August 31, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Come now the above-named plaintiffs, and notify the defendant, and all parties interested, that they intend to appeal from the judgment rendered herein, on the 22nd day of July, 1949, insofar as, and no further, than the Court's denial and refusal to grant them interest on the account sued on, from the 24th day of March, 1948, and from the Court's refusal to grant the plaintiffs an adequate and reasonable attorney's fee to compensate plaintiffs, as by law provided in the Territory of Alaska.

The names and addresses of the plaintiffs are: Bruno Agostino, Box 95, Homer, Alaska, and Stanley Socha, 125 Sixth Street, Anchorage, Alaska; the names and addresses of the plaintiffs' attorneys are: Herman H. Ross and Bailey E. Bell, Central Building, Anchorage, Alaska. The name and address of the appellee is: Columbia Lumber Company, Inc., Anchorage, Alaska; and the attorneys of record for the appellee are: Davis and Renfrew, J. L. McCarrey, Jr., of Anchorage, Alaska, and Robert Boochever of Juneau, Alaska.

The action is one for the recovery of money on account for property had and received, and not paid for.

Plaintiffs in the Court below relied upon, and now contend that they have a right to recover a sum for reasonable attorney's fee as provided by Section 55-11-55 of the Alaska Compiled Laws Annotated, 1949, and Section 25-1-1 Alaska Compiled Laws Annotated 1949, as to interest.

The trial court erred in not granting plaintiffs interest on the sum that the jury found due the plaintiffs from the defendant since there was no controversy as to the date the money became due, and plaintiffs should have been allowed six per cent (6%) interest from that date until paid.

That the trial court erred in granting the plaintiffs only two hundred fifty dollars ($250.00) attorneys' fees when the record before the Court showed services rendered by two attorneys on behalf of the plaintiffs for more than twenty eight days, and that if the plaintiffs were entitled to an attorneys' fee at all, they would be entitled to an attorney's fee that was adequate, and that an adequate attorneys' fee would be at least three thousand five hundred dollars ($3500.00).

You, the said Columbia Lumber Co., Inc., a corporation, and Davis and Renfrew, J. L. McCarrey, Jr., and Robert Boochever, defendant's attorneys of record, are hereby notified that the plaintiffs will appeal the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit setting in San Francisco, California, on all of

the grounds above set forth, and such other grounds and exceptions as are contained in the record.

/s/ BAILEY E. BELL,
/s/ HERMAN H. ROSS,
Attorneys for Plaintiffs.

Service of the foregoing Notice of Appeal is hereby admitted on this 22nd day of August, 1949.

COLUMBIA LUMBER CO., INC.
By /s/ J. L. McCARREY, JR.,
Of Attorneys of Record.

[Endorsed]: Filed August 22, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That Columbia Lumber Company of Alaska, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on July 22, 1949.

FAULKNER, BANFIELD & BOOCHEVER.
/s/ J. L. McCARREY, JR.,
Attorneys for Appellant Columbia Lumber Company of Alaska.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 22, 1949.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME

Comes now the defendant and moves the Court to grant an extension of time of an additional forty days within which the defendant may file herein the transcript of record, designation of record relied upon, and statement of points relied upon in the appeal of the above-entitled action to the United States Court of Appeals for the Ninth Circuit.

This motion is made for the reason that the official Court Reporter has been unable to prepare said record and has advised the defendant that said record will be completed about October 23, 1949.

Dated this 28th day of September, 1949.

FAULKNER, BANFIELD & BOOCHEVER,
J. L. McCARREY, JR.,
DAVIS & RENFREW,
Attorneys for Defendant.

By /s/ J. L. McCARREY, JR.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 29, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

This matter having come on for hearing upon the motion of defendant for an extension of time of an additional forty days to file the transcript of record, defendant's designation of record on appeal, and defendant's statement of points relied upon on appeal, and it appearing to the Court that the transcript of record cannot be completed and filed within the time specified in the Rules,

Now, Therefore, It Is Hereby Ordered that the defendant be, and it is, hereby granted until October 27, 1949, within which to file herein the transcript of record on appeal, the designation of record on appeal, and the statement of points relied upon by the defendant on appeal to the United States Court of Appeals for the Ninth Circuit.

Done in open Court this 7th day of October, 1949.

/s/ ANTHONY J. DIMOND.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered October 7, 1949.

In the District Court for the Territory of Alaska, Third Division

No. A-5207

BRUNO AGOSTINO and STANLEY SOCHA, Co-partners Doing Business Under the Firm Name and Style of BARRY ARM CAMP,

Plaintiffs,

vs.

COLUMBIA LUMBER COMPANY, INC., a Corporation,

Defendant.

PROCEEDINGS

Tuesday, May 31, 1949

Before: The Honorable Anthony J. Dimond, United States District Judge.

Appearances:

HERMAN H. ROSS,
BAILEY E. BELL,
Appearing for Plaintiffs.

R. BOOCHEVER,
EDWARD V. DAVIS,
Appearing for Defendant.

(Whereupon, at 2:30 p.m., the above-entitled matter came on for taking of testimony upon completion of selection of Jury.) [1-2*]

The Court: This is the time set for trial of the

*** Page numbering appearing at top of page of original Reporter's Transcript.**

case of Bruno Agostino and Stanley Socha, copartners doing business under the firm name and style of Barry Arm Camp, plaintiffs, against Columbia Lumber Company, Inc. Are the plaintiffs ready?

Mr. Bell: Oh, yes, we are ready.

The Court: Is the defendant ready?

Mr. Boochever: Yes, Your Honor. At this time I would like to move to have Mr. Davis associated with me in this action.

The Court: Record will so show.

(Selection of members of the jury were had.)

The Court: Counsel for plaintiff may make an opening statement to the jury.

(Plaintiff's opening statement was made by Mr. Ross.)

The Court: Counsel for defendant may make an opening statement to the jury.

(Defendant's opening statement was made by Mr. Boochever.)

The Court: The Court will stand in recess until three o'clock.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Mr. Boochever: I would like to make two short motions at this time, possibly one of them should be made in the absence of the jury. [3]

The Court: Jury may retire to the jury room.

Mr. Boochever: Your Honor, the first motion is in regard to the pleadings, the amended com-

plaint of the plaintiffs, part of it was stricken, one of the causes of action. Now, I haven't been here in Anchorage, but I believe that a new amended pleading was never filed omitting that one cause of action. Am I correct in that, Mr. Bell?

Mr. Bell: I don't remember.

The Court: I am quite sure that is right. I looked at the file yesterday.

Mr. Boochever: I would like to move that the plaintiffs file a second amended complaint omitting that one cause of action and the rest of the pleadings remain the same, which would take care of it because otherwise the jury would have that old cause of action before them. Even if it were x'd out it would still be there before them and it is still contrary to our Code law.

Mr. Bell: Your Honor, when that motion was sustained, immediately following that the answer was filed and there never was any order made to do that but if Your Honor wants me to I will be glad to put that in tonight or in the morning.

The Court: As long as the point is raised, I think it is of no consequence but it may be and as long as the point is raised, why I think it would be better for counsel to file a [4] second amended complaint and omit the second cause of action which was stricken and then the answer may be considered as the answer to the second amended complaint.

Mr. Boochever: Thank you, Your Honor. The other motion we would like to make at this time

is a motion to exclude the witnesses which will appear in this case with the exception of the parties, including the president of the defendant company.

The Court: All of the witnesses with the exception of the plaintiffs and the president of the defendant corporation will be excluded from the court room during the trial of the case, and they may await for call in the wintess room, room 141, which is almost directly across the hall to my right, room 141. I shall request counsel to keep watch of the court room to be sure that no witnesses inadvertently without knowledge of this order come in and remain here. Sometimes witnesses do not know of the order and they sit in the court room and hear some of the testimony contrary to the provisions of the order.

Without objection the record will show all members of the jury present. Witness may be called on behalf of the plaintiffs.

Mr. Bell: Mr. Agostino.

BRUNO AGOSTINO

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bell:

Q. State your name?

A. Bruno Agostino.

Q. How old are you, Bruno?

A. 71 years old.

(Testimony of Bruno Agostino.)

Q. Now, where do you live?

A. I live in Anchorage right now.

Q. You live in Anchorage? A. Yes.

Q. How long have you lived in Alaska?

A. Oh, since 1916 I have been living in Alaska.

Q. What did you do during the years of 1944, '45, '46 and '47?

A. I was engaged in logging camp in Barry Arm.

Q. Did you have a partner in that business?

A. Yes, my partner, Stanley Socha.

Q. Was he and you the sole and only owners of Barry Arm at the time in March of 1948?

A. That is true.

Q. Now, how many years did you work down there?

A. Well, better than three year, I wouldn't say, about three years and one half.

Q. Did you build any buildings there?

A. Yes, we built several buildings. We build two nice buildings, that is what we call the cook-house and the bunkhouse. It [6] is all combined. That is one building together.

Q. The dimensions, I believe you stated, were 24 feet by 30 feet? A. Yes.

Q. Now, what is that built of, Bruno?

A. Well, I couldn't give you exact figures. We say it cost in labor because the logs cost nothing. At least cost about $3000.

Q. For your labor? A. Just for labor.

(Testimony of Bruno Agostino.)

Q. You didn't understand me, Bruno, what is it built out of? A. What?

Q. What did you build it of?

(No response.)

Q. What did you build it of, did you build it of logs?

A. Yes, built it of logs except the roofs and windows and the floor and partitions, that is lumber, that is frame inside.

Q. Do you have hot and cold water in the place?

A. Yes, we have a water system.

Q. It is modern in every way, is it?

A. Yes.

Q. What other buildings did you build there?

A. Well, they got garage for two cats. They is 18 by 24. That is all-frame building.

Q. That is a frame building? A. Yes. [7]

Q. Now, what else did you have there, Bruno?

A. Well, we had a D-7, D-8 cats and a donkey and lots of what we need, we have 24,000 feet of cable, blocks, well, I cannot remember everything I have, I haven't a list.

Q. Do you have a, what is called a "donkey engine"? A. Yes.

Q. Was that all equipped for operation?

A. Yes.

Q. Did you have a sawmill that you have moved in there?

A. Sawmill, the only machine need to attach it was a belt; it was complete setup.

(Testimony of Bruno Agostino.)

Q. Had you done all that during the three and one-half years that you had operated there?

A. Yes, sir.

Q. Now, Bruno, during the time you were working there or operating, did you sell logs to the various people?

A. We sell log to Columbia Lumber Company and we sell log to the Elemar and to the Nellie Wand.

Q. And you sold logs generally to the people who came for them? A. Yes.

Q. And how many different times had you sold lots of logs or rafts of logs, we will say, to the Columbia Lumber Company?

A. Well, I don't know how many time, but every time that we have a raft they come in and get it. We just tell them and they come in and get it. [8]

Q. Now, who would come down there as a general rule?

A. Several time they come in—Mr. George Morgan.

Q. Wait, a little slower. Who? A little slower.

A. George Morgan.

Q. Was that the gentleman sitting over there?

A. He has come in last of May, 1948, on my last raft.

Q. It was May, 1948? A. Yes, sir.

Q. And this gentleman sitting here was there?

A. Yes, that is Mr. Tom Morgan.

Q. Is that Tom Morgan? A. Yes.

(Testimony of Bruno Agostino.)

Q. Now, who is George Morgan?

A. That is his brother.

Q. Now, do you know what relation this gentleman sitting here has with the Columbia Lumber?

A. They are supposed to be a president, a general manager of the company.

Q. President and general manager?

A. Yes.

Q. I will ask you to give us more detail on what you had on the grounds there, say, in March of 1948, you had the cookhouse—I will repeat the things you have described—the cookhouse and the garage and two cats, I believe you stated. Now, cats, you mean by that caterpillars? [9]

A. Caterpillar D-7 and D-8, they call it.

Q. D-7 and a D-8? A. Yes, big cats.

Q. And you had a sawmill, you stated?

A. Yes.

Q. Now, you refer to it in your list here as a sled, will you explain to the jury what a sled is, what is meant by that?

Mr. Boochever: Your Honor, I must object to his leading the witness and referring to a list which isn't in evidence.

The Court: If the witness needs a list to refresh his memory he may see it. Can you read English?

The Witness: Yes, Your Honor.

Mr. Bell: Now, just in your own words, tell the jury what you had there in March of 1948?

Mr. Boochever: Excuse me, Your Honor, I hes-

(Testimony of Bruno Agostino.)
itate to interpose again but I think if the witness is going to use a list he should state where he made it and so forth so it is identified.

The Court: The objection is overruled. I think the witness can refresh his recollection; counsel can examine the memorandum if he wants to and cross-examine upon it. Overruled. And in this case as in every case, exceptions are deemed to be taken as of course to all adverse rulings but that does not preclude counsel from voicing exceptions on every occasion that counsel so desires. You may proceed, Mr. Agostino.

The Witness: This sled you mention—this sled, that is [10] what the donkey is sitting on to pull it through the woods. Then they got another sled that they use to call it a carrier this oil barrel to the donkey to the cats through the woods and pull by another cats, that would be about 6 feet wide and 12 feet long, but the donkey sled it is about 30 feet long and it is the width of the donkey—about 8 feet wide.

Q. (By Mr. Bell)): About 8 feet wide and 30 feet long? A. That is on the donkey.

Q. And the other sled?

A. It is 6 by 12.

Q. Go ahead and look on the list there and explain to the jury what each of those things were?

A. Well, you mean what it cost?

A. No, tell them what you had there at the time?

(Testimony of Bruno Agostino.)
You had the donkey and the caterpillars and the houses, just tell them everything.

A. Yes, I have two cats, one sawmill, one light plant, one drill press, two vice, one handle, an old miscellaneous tools, blocks.

Q. Mr. Agostino, that is my handwriting, is it not, that you are reading from? A. Yes.

Q. I wrote that, did I not, in your presence?

A. Some of this I don't understand what you mean.

Q. Mr. Agostino, you told me that list and I made it out in my handwriting, didn't it? [11]

The Court: I think you had better take the list, counsel, it doesn't seem to be of much help.

Mr. Bell: He doesn't seem to read my terrible handwriting. Now, was the bunkhouse furnished?

A. Well, it is partly furnished.

Q. What did it have?

A. About 8 bed in there, springs and mattresses, no blankets.

Q. 8 beds and springs and mattresses and no blankets?

A. No blankets. We have a cook stove—oil stove—and the hot water tank, and all the dishes for about 12 men.

Q. Did it have pots and pans and everything there?

A. Yes, it was complete for a bunch of men, about 12 men.

Q. Now, what about the trap logs or logs that

(Testimony of Bruno Agostino.)

you had there at the place for booming or grouping your timber, explain that to them, Bruno?

A. Trap log, that is a log that go to the fish canneries.

Q. I have asked you wrong, I mean boom logs?

A. Boom logs was there right there on the boom. The boom was cut off by some storm, that is.

Q. Go ahead and tell after the storm cut the boom, did you take the logs inside?

A. No, I left it right there. They was there when the Columbia Lumber Company move in. They come in to get it.

Q. Where were they? A. In the pond.

Q. In the pond? A. Yes.

Q. Now, did you have chains to connect those logs? A. Yes, we had a chain there.

Q. About how many of those boom logs did you have there?

A. Oh, 17, 18 or more, I don't remember exact number.

Q. Now, how much more timber had you bought from the Government that you had not yet cut at the time you sold out?

A. On October 1st I bought the last permit, that was 250,000 feet.

Q. Do you remember how you paid for that, Bruno? A. Yes.

Q. What year was that, October of what year? A. 1947.

Q. Did you pay for that with a check?

(Testimony of Bruno Agostino.)

A. I paid by check. I give it to one of the men and he took it to Juneau and gave it to the Treasury of the United States.

Q. Did you later receive that check back through your bank? A. Yes, I got the check back.

Q. In other words the check was the check paid through your bank afterwards? A. Yes.

Mr. Bell: Your Honor, I would like to have this marked.

The Court: It may be marked for identification as Plaintiffs' Exhibit 1. [13]

Q. (By Mr. Bell): Mr. Agostino, I hand you a check that has been marked Plaintiffs' Exhibit 1 and I will ask you to state, if you know, what that is?

A. Yes, this is in payment for 250,000 feet timber to the U. S. Government.

Q. Who signed that check?

A. I signed the check. It is my name here.

Q. Did you get it back from the bank after it was cleared? A. Yes, sir, Bank of Alaska.

Q. And is it now in the same condition as it was then save and except for the identification stemp the Clerk just put on it? A. Yes.

Mr. Bell: We now offer it in evidence.

The Court: It may be shown to counsel.

Mr. Boochever: Your Honor, we object to it being incompetent and irrelevant. The pleading shows any timber contract the plaintiff had in 1947 and they are pleading on a 1948 agreement.

(Testimony of Bruno Agostino.)

The Court: Objection may be overruled. It may be admitted and read to the jury.

Mr. Bell: Bank of Alaska. "Alaska's Branch Banking System." Anchorage, Alaska, October 31, 1947. Pay to the order of the Treasury of the United States $250.00. And in [14] writing Two-hundred fifty and no/100reths dollars. Signed Bruno Ogostino and is stamped on the back Pay to the order of the First National Bank, Juneau, Alaska for credit to the United States of America, Forest Service, Juneau, Alaska. And then it has another stamp Pay to the order of any bank or banker. All prior endorsements guaranteed. First National Bank, Anchorage Alaska.

Q. Mr. Agostino, what did that payment represent?

A. It represented the right to go ahead and cut the timbers according to the Government rules.

Q. Then after you paid that on October 31, 1948 had you cut any of that timber up to the that you turned the place over to the Columbia Lumber Company?

A. No, October 31st, that is pretty near the middle of winter. The season started cutting in May.

Q. In other words, I wanted to get it clear, that was in October, you didn't cut any more that fall? A. No.

Q. That was an advance payment then ror timber that you were going to cut in 1948?

A. Yes.

(Testimony of Bruno Agostino.)

Mr. Davis: Your Honor, Mr. Bell should be admonished about leading the witness; he should let the witness testify for himself.

The Court: Objection is sustained. [15]

Q. (By Mr. Bell): Now, Mr. Agostino, after that did you live there during the winter?

A. Yes.

Q. About what date did you see anyone connected with the Columbia Lumber Company after October 31, 1947?

A. Well, that is in March Mr. Lambert he came there with his scow and his machinery and I stop him.

Q. Now, talk a little slower so they can understand you. That was in March, you say?

A. March, 1948.

Q. What was that fellow's name?

A. Blacky Lambert.

Q. Blacky Lambert?

A. Yes, superintendent of the logging camp for the Columbia Lumber Company.

Mr. Boochever: Your Honor, I move that that last part is a conclusion of the witness as to whether he was a superintendent of the logging company of Columbia Lumber and move that that be stricken.

The Court: Motion is denied.

Q. (By Mr. Bell): Was this Blacky Lambert that you refer to, is that the same as Kenneth D. Lambert? A. Yes. [16]

Q. It is the same man? A. Same man.

(Testimony of Bruno Agostino.)

Q. Now, then, will you please tell the jury if you had a conversation with this Kenneth D. Lambert at that time?

A. First time we had a conversation he wanted to land there and I told him if I let him land there it will stop me, block me, I couldn't operate it. So they went back and they came back in a week time, back to my camp again.

Q. Now, before you tell about that, tell the jury how you operated in the mouth of Mosquito Creek? Tell the jury how you worked there, how you gathered your logs?

A. Mosquito Cree*d* is another channel. It is too small for two outfits, for just one outfit. You have to put logs and block them in the channel and make a raft in there and let them out and a bigger boat to take away—bigger boat to come there and pull it out.

Q. How wide is Mosquito Creek normally?

A. Normally when the tide is out in about 18 to 20 wide.

Q. 18 to 20 feet wide? A. Yes.

Q. Now, then, when it is high tide and the tide is in, how wide is it?

A. Maybe 400 feet wide and there is 20 feet of water.

Q. And 20 foot deep, you mean?

A. In the channel of the creek. Maybe on the side maybe it [17] is ten feet high—deep.

Q. Tell the jury how you operated, how you

(Testimony of Bruno Agostino.)

held the logs in there at the mouth of Mosquito Creek?

A. We put in a boom in there and chain it one log to the other and put the other logs and raft and when they are ready let them out to take it.

Q. Now, do I understand you chain the logs together? A. Yes.

Q. That is what is called a boom? You put——

A. You put all the logs inside that boom and then they pull them out.

Q. Had you been operating that way ever since you went there? A. Yes.

Q. When you had your log—your boom in there could anyone else get in and out? A. No, sir.

Q. And if anyone else had a boom in there could you get in and out?

A. No, just enough for one boom—one raft.

Q. Now, how much timber had you cut over—how many acres of timber had you cut over prior to March of 1948?

A. I don't remember that. We got four permits. Last permit never been touched. Three permits we take out. Let's see, three permits make 750,000.

Q. You had taken out 750,000 board feet? [18]

A. Yes.

Q. And you had a permit for 250,000 more?

A. More.

Q. Mr. Agostino, I hand you a paper that has been marked for identification No. 2—Plaintiff's

(Testimony of Bruno Agostino.)

Identification No. 2—and I will ask you to state what that is?

A. Yes, this is the map. It is how the country look over there.

Q. Who drew that? A. I draw that.

Q. Is that a fair likeliness of the conditions as they were at the time? A. Yes.

Q. Is that a fair map of the actual surroundings?

A. That is the way it look of the country over there.

Q. Does that show your building and improvements? A. Yes.

Q. Does it show the logging woods that you had cut over and the one that you had purchased to cut over? A. Yes, it shows the blocks, yes.

Q. Now, as far as you are able to do it, that is a correct map of conditions as they existed there in March, 1948? A. Yes.

Mr. Bell: I now offer it in evidence.

Mr. Davis: Your Honor, it will take a few minutes to look [19] at this, might we have a little recess?

The Court: Court will stand in recess for five minutes.

(Short recess.)

The Court: Without objection the record will show the counsel for plaintiff has marked in identification a map.

Mr. Davis: Constituting what?

(Testimony of Bruno Agostino.)

The Court: It is my understanding that it is a map, not accurate nor drawn to scale, but it is offered according to my understanding merely to illustrate the testimony of the witness.

Mr. Davis: We have no objection to it for that purpose.

The Court: It may be admitted and marked as Plaintiffs' Exhibit 2.

The record will show all members of the jury present.

Q. (By Mr. Bell): Mr. Agostino, will you come down here in the presence of the jury and take the butt end of this pencil so it will not mark. Now, Mr. Agostino, please point to your bunkhouse building as shown there?

A. That is the bunkhouse right there.

Q. Now, then, will you please point to the garage building?

A. That is the garage right there.

Q. Now, will you please explain to the jury where the mouth of Mosquito Creek is?

A. Here is the mouth of Mosquito Creek. [20]

Q. About what distance is it from your bunkhouse to the mouth of Mosquito Creek?

A. About a thousand feet.

Q. And about how far is it from the garage building to the mouth of Mosquito Creek?

A. It is, say, 980 feet because the garage is only 20 feet—about 25 feet from the bunkhouse.

Q. Now, would you please point to the part of

(Testimony of Bruno Agostino.)

the timber lands that you have cut over, already took the timber off?

A. That is Forest Permit No. 1; that is second permit that is cut off; and that is the third one. This is the one I bought on October 31st that never has been touched, 250,000 feet on that of logs.

Q. Now, did I understand you that the one you pointed to up higher was the one you bought in October, 1947? A. '47.

Q. Is that the one the check represents that you introduced in evidence?

A. Yes, I introduced because this has never been touched.

Q. Now, Mr. Agostino, have you drawn on there anything else other than the matters I have mentioned to you? A. Well, I draw the sawmill.

Q. Now, show the jury where the sawmill was?

A. There is the sawmill.

Q. Did you draw the donkey with the lines? [21]

A. No. No, I haven't.

Q. Will you please explain to the jury what the red lines represent where your pointer is?

A. Red line represent road that cat that go through here. That is the road that go into the garage and come in here and go around here to the pond where the waters are high. We can't go through there and we take the cutoff here and we go around to the pond and up to the timber and put the timber into the pond over here. All the red line that is the road we went through with

(Testimony of Bruno Agostino.)

the cat. We leveled it up so we could go through.

Q. Who built those roads?

A. We built that road with a D-8 with a blade.

Q. Yourself and Stanley Socha, who is your partner? A. Yes.

Q. Had those roads all been built prior to March, 1948—before March, 1948?

A. This have been a complete by 1948 but we started since 1944-45.

Q. You built them from 1944 up to 1948?

A. Yes, when we reach in there that was 1948.

Q. Did Mr. Blacky Lambert see those roads when he was there? A. Yes, he used it, too.

Q. He used them? A. (No response.)

Q. Did he see all of those things there when he came to see you? [22]

A. Yes, I gave him possession to all of these things.

Q. That will be all, then. We will roll the board back. You can take the stand again now. Now on the third trip that you have referred to that Mr. Lambert, superintendent for the defendant company, came to see you, did you give him possession of everything at that time?

Mr. Davis: Now, Your Honor, I object to this question for several reasons, in the first place there isn't any evidence at all that Mr. Lambert was the superintendent for Columbia Lumber; and in the second place, if I remember the evidence rightly, Mr. Agostino hasn't testified to any third

(Testimony of Bruno Agostino.)
trip; in the third place, Mr. Bell, in asking him if he gave possession of all these things, is leading the witness.

The Court: Objection is sustained.

Mr. Bell: I am just repeating what the witness said. He said he gave him possession of those things.

Mr. Davis: I think he did that without the rest.

Mr. Bell: I was having him fix the time. Your Honor, Mr. Agostino has testified that Lambert was superintendent for the Columbia——

The Court: He made a description of that; I suppose it might be considered testimony.

Q. (By Mr. Bell): Now, Mr. Agostino, have you told us about the third trip when Lambert came back, did you tell us that? [23]

A. Well, Your Honor, the second time—I don't tell you the second time yet.

Q. Tell me about the second trip?

A. When he came second trip he said that he had a letter from the Columbia Lumber Company to moving them——

Mr. Boochever: Object to anything Mr. Lambert said as hearsay.

The Court: Overruled.

Mr. Davis: I think, Your Honor, it is necessary before any testimony be brought in he be shown to be an agent of some kind not merely that he is an agent of the superintendent.

The Court: Overruled.

The Witness: He show me a letter to come from

(Testimony of Bruno Agostino.)

Columbia to move into that pond and I told him "You can't move here." The telegram came from Juneau and it——

Q. (By Mr. Bell): What did the telegram say?

A. The telegram——

Mr. Boochever: I must object. That is not the best evidence. The telegram itself is the best evidence.

The Court: Have you got the telegram?

The Witness: Mr. Lambert has the telegram. I gave it to him to call Mr. Morgan.

The Court: Is Mr. Lambert your witness in this case?

Mr. Bell: We will have Mr. Lambert [24] here.

The Court: Objection is well taken.

Mr. Bell: Your Honor, to save time while he is talking to Mr. Lambert, he has been subpoenaed here.

Q. You say you gave him the telegram or did he give you——

A. He show it to me and he said he would go talk to Mr. Morgan and he take the telegram to him and he take it back to him. It was just to show to me.

Q. Who? A. Mr. Lambert.

Q. I understand now, to get it clear, Mr. Davis, he showed you the telegram? A. Yes.

Q. You read it and gave it back to Blacky?

A. To Mr. Lambert.

Q. Now, then, what happened after that?

(Testimony of Bruno Agostino.)

A. Well, he went to call Mr. Morgan on long-distance telephone and he told him that the only way to land——

Q. You can't tell what he told. Now, he did go away then to call Mr. Morgan? A. Yes.

Q. Now, then, when did you next see Lambert?

A. I—next time was about the 21st of March—24th of March.

Q. Now, then, how did he come to your place at that time? A. He came with a boat.

Q. And do you know who was with him when he came? [25]

A. Well, most of the time Mr. Griffen—Cliffend.

Q. Now, was that the time—was that the first trip you say he came he had this man with him?

A. Right.

Q. When he came back the second time who came with him? A. Ted Rowell.

Q. Who else came besides Ted Rowell and Mr. Lambert? A. Nobody else, them two.

Q. And they were in a boat?

A. The other fellows stay on the boat and I don't see them.

Q. What kind of a boat was it?

A. Well, that is a kind—small steamboat. It is travelled by gas engine—a bigger gas engine—I wouldn't say what kind of boat, a pretty good sized boat because it pulled the raft.

Q. It was one that they pulled rafts with?

(Testimony of Bruno Agostino.)

A. Yes, it was working for the Columbia Lumber Company.

Q. Then the third time that he came who came with him?

A. Well, Mr. Lambert and Mr. Ted Rowell that came together and they told me that Mr. Morgan come on the 10th of April and settle with me.

Q. Up to that time had you talked to Mr. Morgan personally about the sale of the property?

A. You mean on the 10th of April?

Q. No, I mean on the 24th of March. [26]

A. That is Mr. Lambert who did all the talking.

Q. Mr. Lambert did all the talking and you talked to him?

A. And I talked to Mr. Lambert.

Q. Now, did you and Mr. Lambert discuss the price that was to be paid for your holdings there?

A. Yes.

Q. Now what was the price to be paid for your holdings?

Mr. Boochever: Object to that; there is no showing that Mr. Lambert had any authority at all in this case to make any representations on behalf of the defendant and it is completely irrelevant what conversations were had in that connection.

The Court: The whole case cannot go in at once and for that reason the objection is overruled. Ladies and gentlemen, you are instructed that unless it is shown at sometime that Lambert had authority to represent the Columbia Lumber Company the

(Testimony of Bruno Agostino.)

Columbia Lumber Company isn't represented at all. I am admitting it because we must make such progress as we can in the trial of the case.

Mr. Boochever: I would want for the record to add a further objection that it is not the best evidence in that a subsequent written contract was entered into beween Columbia Lumber and Mr. Agostino embodying the same property and that is the best evidence and the Parole Evidence Rule prevents the introduction of any—The defendant denied the oral contract in March.

The Court: Objection is overruled. [27]

Q. (By Mr. Bell): On the other trips, the conversations between you and Blacky was concerning the price, is that right? A. Yes.

Q. Now, then, what did you tell him you would take for your property?

A. I told him that the price is $25,000—$19,000 for the machinery and $6,000 for the rest of the building and cable and things that we have in there, blocks, all material that we had.

Q. Mr. Agostino, were you familiar with the value of your equipment there at that time?

A. Well, I wasn't familiar because we pay that much money for it.

Q. You had bought it yourself and built it yourself?

A. Yes, and we had paid for the machinery. I sell for the same price that I pay it.

Q. And you had paid that amount of $25,000?

(Testimony of Bruno Agostino.)

A. Yes.

Q. Now, then, when Blacky came back the third time, did he bring someone with him?

A. They bring Mr. Ted Rowell and he said that he speak of a Mr. Morgan long-distance telephone and he told what I said in my price.

Mr. Davis: Your Honor, for the sake of the record we would [28] like to make another objection.

The Court: Objection is overruled.

Q. (By Mr. Bell): Go ahead?

A. He had set the price and he said they are going to be up on the 10th of April and settle with me and he did come on the 10th of April and give order to his officer to start my cat and see how they go and he came back in two days. Mr. Morgan never came back.

Q. He did come back on the 10th of April?

A. Yes, and talked to me and talked to that officer—to Mr. Blacky and Mr. Ted Rowell who was there too.

Q. And did they start the cats up at that time?

A. Yes, they started the cat but Mr. Morgan was not there when they started the cat. He just gave the order to start the cat and he go and say "I come back in two days" and Mr. Morgan never come back.

Q. Did he pay you anything?

A. Never paid me a red penny yet.

Q. What did you do then after Mr. Morgan

(Testimony of Bruno Agostino.)

came there and told the men to start the cats, what did you do?

A. Well, I don't do nothing. But I gave him possession, what else I could do? I just stayed there and waited for Mr. Morgan and Mr. Morgan didn't come and I come into town here.

Q. What did you do in giving him possession?

A. By letting him land and tell them to use all my machinery and my bunkhouse—everything I have in there—and my timber.

Q. Did they land there?

A. Yes, he landed there.

Q. Did he start operations?

A. Well, they don't start operation at the present time because he was too much, but they straighten up their machinery and run into my garage and get whatever they need, back and forth for pretty near a month, before they go through the woods—go through my pond to cut the timber down.

Q. In other words, if I understand you right, they were there about a month before they actually started cutting timber? A. Yes.

Mr. Davis: I think it is not proper to summarize everything he says in Mr. Bell's words.

Mr. Bell: Your Honor, it is the only way it can be clear to the jury.

The Court: I think that counsel has difficulty understanding the witness' words. The witness apparently is intelligent enough but is unable to speak

(Testimony of Bruno Agostino.)

the English language so that we can readily understand it. I think you can avoid a great many of the leading questions, Mr. Bell.

Q. (By Mr. Bell): Then, after they did start cutting timber what happened?

A. Well, when they cut the timber out, 'came into Anchorage [30] and I don't know what they did do. They cut my timber first because they couldn't go into that block until they go into my block of timber and they promise to come in and pay and I never see Mr. Morgan and I went and got Mr. Butcher to settle this thing and nothing has been settled so far, never got red penny yet.

Q. Then, as I understand, you came to Anchorage? A. Yes.

Q. And have you ever been paid anything up to this time? A. Up to right now.

Q. Mr. Agostino, did you and Mr. Butcher go back down to the place later?

A. Yes, we went down in there. We take an airplane and went in there and we take a picture and my timber was all cut off and they was using my pond and whatever they wanted to take out in the camp they had that in their possession—my sled—whatever they fitted them to use they taken because I give them possession.

Q. Mr. Agostino, I hand you a photograph that has been marked applicant's—rather, Plaintiffs' Exhibit Identification No. 3, and I will ask you to state, if you know, who took that picture?

(Testimony of Bruno Agostino.)

Mr. Davis: Your Honor, we are still examining and I will ask——

The Court: Will counsel wait until defendant has an opportunity to listen? [31]

Mr. Bell: If it is not objectionable, Your Honor, I will stand over here to save time.

Q. Mr. Agostino, who took that picture?

A. I take that picture, me and Mr. Butcher.

Q. Was Mr. Butcher there at the time you took it? A. Yes.

Q. Is that Harold Butcher, the attorney.

A. Yes.

Q. Now, would you tell the jury what that is a picture of?

A. That is a frame from Columbia Lumber Company set-up in my pond.

Q. And is that a good likeliness of the condition that existed there that day? A. Yes.

Mr. Bell: I now offer it in evidence.

The Court: Is there objection?

Mr. Davis: I will have to examine them again, Your Honor. No objection.

Mr. Bell: May it be handed to the jury?

The Court: If there is no objection.

Q. (By Mr. Bell): Mr. Agostino, I hand you a photograph which has been marked Plaintiffs' Exhibit Identification 4, I will ask you to state who took that? A. I took that. [32]

Q. And was that taken at the same day that you took the other one that was just shown?

(Testimony of Bruno Agostino.)

A. Yes.

Q. And I have forgotten about what date you said that was?

A. I have forgotten the date myself. It was around the latter part of May, 1948.

Q. And that was the day that you and Mr. Butcher went there? A. Yes, sir.

Q. What is that a picture of?

A. This is the Columbia Lumber Company camp right on the back end of my pond. That is the pond here.

Q. Were those buildings there when you sold out to the Columbia Lumber Company?

A. No, they bring them on scows.

Q. Now, when did those scows come in? When did those buildings come into the mouth of Mosquito Creek?

A. They come in by March 23rd or 24th, 1948, and they stay there until first of April. I don't remember the date when they moved back because the pond is half a mile back of the water landing.

Q. And they were on the scows then when Mr. Lambert and you were talking on March 24, 1948?

A. Yes, sir.

Mr. Bell: We now offer the picture in evidence.

The Court: Is there objection? [33]

Mr. Davis: I have no objection to that one.

The Court: The photograph marked for identification as Plaintiffs' Exhibit 4 may be admitted.

Mr. Bell: May I now hand it to the jury?

The Court: It may be handed to the jury.

(Testimony of Bruno Agostino.)

Q. (By Mr. Bell): Mr. Agostino, I hand you a photograph which is marked Plaintiff's Exhibit Identification No. 5, and ask you to state who took it? A. Me and Mr. Butcher taken this.

Q. Was that taken at the same time the others were taken? A. Yes.

Q. Now, then, tell the jury what that is a picture of?

A. That is a picture right on west side to Columbia Lumber Camp. That is what I have. That is my tree-fall down.

Q. Was that in the ground you had bought from the Government for the timber—bought the timber from the Government? A. Yes.

The Court: It may be shown to counsel for the defendant.

Mr. Bell: Your Honor, he just looked at it.

Mr. Davis: Did you say, Mr. Agostino, that was the west side of the Columbia Lumber——?

The Witness: Yes, when they—west side of the camp, I say.

Mr. Davis: No objection. [34]

The Court: It may be admitted marked Plaintiffs' Exhibit No. 5.

Mr. Davis: May I now hand it to the jury?

The Court: It may be handed.

Q. (By Mr. Bell): Mr. Agostino, I hand you a photograph marked Plaintiffs' Exhibit Identification No. 6, and ask you to state who took that picture?

(Testimony of Bruno Agostino.)

A. I took that picture, me and Mr. Butcher.

Q. Was it taken at the same time the others were taken? A. Yes.

Q. Now, what is that a picture of?

A. That is the cut-off road from the pond through here, because when the tide is high we couldn't go around. It is a little bluff you seen in the map right at the edge of the pond.

Q. And that is on the ground where you built the road? A. Yes, two roads.

Mr. Bell: We now offer it in evidence.

Mr. Davis: No objection to Exhibit No. 6.

Q. (By Mr. Bell): Now, I now hand it to the jury please. Mr. Agostino, I hand you a photograph marked Plaintiffs' Exhibit Identification 7 and ask you to state who took that?

A. That is taken same time as the rest of them of it. That is the 'plane bringing me to Barry Arm that is in front of the [35] camp. That is the shore line.

Q. Where 'planes landed at your camp? Would they land there for coming to your camp?

A. That is the only place they can land, no other place to land. This is the donkey right there.

Q. In the left side of that picture does it show your donkey? A. Yes, sir.

Mr. Bell: I now offer it in evidence.

Mr. Davis: No objection.

The Court: It may be admitted.

(Testimony of Bruno Agostino.)

Q. (By Mr. Bell): Now, Mr. Agostino, I hand you a marked photograph, Plaintiffs' Exhibit Identification No. 8, and ask you to tell me if that picture was taken by you? A. Yes.

Q. Was that taken at the same time the others were taken?

A. It is a little donkey sitting there and the 'plane picture is below. That is the shore line.

Mr. Bell: Your Honor, I don't know whether the jury can understand. Please talk slowly, Mr. Agostino, and tell the jury what that is a picture of. Now talk slowly and make it clear.

A. That is a picture of the donkey, this lower donkey that we have there to work timber.

Q. Was that your donkey up to the 24th day of March, 1948?

A. It was my donkey until I give it to the Columbia Lumber [36] Company.

Mr. Bell: I now offer Identification No. 8, which is the donkey.

The Court: It may be admitted without objection and may be exhibited to the jury.

Q. (By Mr. Bell): Mr. Agostino, I hand you a photograph marked Plaintiffs' Exhibit No. 9 and ask you to state who took that picture, if you know?

A. I take that picture myself.

Q. Was it taken at the same time the others were taken? A. At the same time.

Q. Now, then, will you tell the jury what that is a picture of?

(Testimony of Bruno Agostino.)

A. That is a picture of the donkey sitting here with all these empties.

Q. Now, tell us again what it is in the picture; what it is a picture of?

A. That is the same donkey, 'way that is shown on the other picture and the empty barrels, all of them are empty barrels.

Q. Oil barrels, is that right?

A. Oil barrels.

Mr. Bell: I now offer Plaintiffs' Exhibit 9.

Mr. Davis: Your Honor, I think it is the third picture of the donkey. I think it is merely repetitious. [37]

Q. (By Mr. Bell): Mr. Agostino, I hand you photograph marked Plaintiffs' Exhibit No. 10 and ask you to state if you took that picture?

A. Yes.

Q. Was it taken at the same time you took the others? A. Yes.

Q. Now, then, tell the jury what that is a picture of? Now, talk slowly so they can understand you.

A. That is a picture of the pond where we keep log in.

Q. Now, is that a good picture of the place—that is a good likeliness?

A. That is the way it look.

Mr. Bell: We now offer Plaintiffs' Exhibit Identification 10.

Mr. Davis: No objection.

(Testimony of Bruno Agostino.)

The Court: It may be admitted and exhibited to the jury.

Q. (By Mr. Bell): I now hand you Plaintiffs' Exhibit No. 11, which is a photograph, will you explain who took that picture?

A. Yes, I took that picture.

Q. Was it taken at the same time the others were taken? A. Yes.

Q. Now, then, tell the jury what that is a picture of?

A. That is a picture of back—that is a cut-off on the road that goes off to the pond. [38]

Q. It is a cut-off, you say?

A. Cut-off road here. It is another road around in there.

Q. That is a picture of the road?

A. Over the road.

Q. Where does the road lead to?

A. Into the pond.

Q. Now, where was your camp with reference to the end of that road?

A. On the west of this picture this way.

Q. West of the picture?

A. Yes, that is north and that is south and that is east and west. It is on this side.

Mr. Bell: We now offer Identification 11.

The Court: Is there objection?

Mr. Davis: No objection.

The Court: It may be admitted.

Q. (By Mr. Bell): I now hand you Plaintiffs'

(Testimony of Bruno Agostino.)

Exhibit No. 12, which is a photograph, please tell the jury who took that picture, if you know?

A. It was taken same time the others were taken. I take that picture.

Q. Was it taken at the same time the others were taken? A. Yes.

Q. Now, then, tell the jury what that is a picture of? A. That is a picture of the pond.

Q. The pond?

A. Pond what we store logs in.

Q. What you store the logs in? A. Yes.

Q. Is that a fair representation of the scene?

A. It is, that is the way it look.

Q. What is the little building?

A. That is the little building. That is where Lambert put up after he put in there.

Q. Blacky Lambert? A. Yes.

Mr. Bell: We now offer Identification No. 12 in evidence.

The Court: It may be admitted.

Q. (By Mr. Bell): I now hand you Plaintiffs' Exhibit No. 13, which is a photograph and ask you to state if you took that and under the same circumstances you took the others? A. Yes.

Q. Now, then, in your own words tell the jury what that is a picture of?

A. That is the edge of the logging-off land block. That is the new block you suppose to get in there.

Q. Did I understand you that this is the logged-off part? A. Logged-off part.

(Testimony of Bruno Agostino.)

Q. And that the back part is the new timber that you had [40] bought? A. Yes.

Mr. Bell: We now offer it in evidence.

The Court: Is there objection?

(No response.)

The Court: It may be admitted.

The Court: I think we might safely shorten the examination somewhat by asking the witness one question as to all of the photographs you intend to show to him, where he took them and under what circumstances and on what date and whether each of them is a fair representation of what it purports to show. Have counsel for defendant any objection to that?

Mr. Davis: Only, Your Honor, some of them were not taken at the same time. There are some pictures of a different size. I have no objection to that question as to all of these larger pictures. They were probably all taken at the same time. There are some smaller pictures.

Mr. Bell: I will do that, Your Honor. I think it is a very good suggestion.

Q. Mr. Agostino, I hand you for examination Plaintiffs' Exhibits 13, 14, 15, 16, 17, 18, 19, 20, 21—

The Court: Not the small ones.

Q. (By Mr. Bell): We will leave out 21, 22, 23, 24 and 25. You glance through those now and see if you took all of those pictures? [41]

A. Yes, I take all of this.

Q. Did you take them all?

(Testimony of Bruno Agostino.)

A. I take all these at the same time.

Q. On the same trip? A. Same trip.

Q. And on the same date? A. Same date.

Q. Are they fair likelinesses of the conditions that existed there at that time? A. Yes.

Q. Now, I will go through them. Now, tell the jury what No. 13 is?

Mr. Davis: I think you have already identified that.

The Court: It has already been introduced.

Q. (By Mr. Bell): Tell us what No. 14 is?

A. This is the first one you give to me. That is air frame sitting in the pond.

Q. Is that in your old pond? A. Yes.

Q. Did you build that there or not?

A. Well, the air frame of the Columbia Lumber Company bring it into my pond.

Q. Mr. Agostino, Ed wasn't here when you testified, what did you say that was? [42]

A. Air frame that they call it. A-frame, that pull a raft pulling the raft out of logs.

Q. I believe you stated that that was not there when you sold out but it was put in there by the Columbia Lumber Company? A. Yes, correct.

Mr. Davis: No objection.

The Court: It may be admitted and exhibited to the jury.

Q. (By Mr. Bell): Now, I hand you Identification 15 and ask you to state what that is a picture of?

A. That is a picture of what the sawmill set.

(Testimony of Bruno Agostino.)

That is the frame of the back end of the sawmill.

Q. Is that in the same condition that it was when you sold to the Columbia Lumber Company?

A. Yes, sir.

Q. And this was taken at the same time the others were taken?

(No response.)

Mr. Bell: We now offer this one in evidence.

Mr. Davis: No objection.

The Court: It may be received.

Q. (By Mr. Bell): I hand you Identification 16 and ask you to state what that is?

A. That is the pond. That is the Columbia camp on the back end of the pond. [43]

Q. Is that the pond that you used all during the time you were there? A. Yes.

Q. Now, what is the buildings that can be seen?

A. The original building in there, just give it to Columbia. They get it in there and set it up there. There was no building in there before, no building. The Columbia Lumber Company they bring it and set it up there.

Mr. Davis: No objection to that one.

The Court: It may be admitted and may be shown to the jury.

Q. (By Mr. Bell): I now hand you Identification 17 and ask you to tell the jury what that is a picture of?

A. That is a picture of one side of the pond with the road, I think, that goes in there.

(Testimony of Bruno Agostino.)

Q. With the road going into it? A. Yes.

Q. Now, is there anything in there that shows up in that picture that was not there prior to the time that you turned the section over to the Columbia Lumber Company?

A. Yes, that is the company building right there. You will see it as shown in the other picture is shown very little because we was too far for the camera.

Q. And that is the same buildings that were put in there that [44] you testified about in the other picture?

A. Yes, that the company put up there.

Mr. Davis: Your Honor, I object to this picture as being repetitious. That is about five pictures of the pond and about three of the building.

Mr. Bell: Your Honor, it shows that it is clear around. It is a large place.

The Court: Overruled. It may be admitted and may be shown to the jury.

I wish counsel would look at the pictures and not unnecessarily burden the record with repetition.

Mr. Bell: I don't believe there is any repetitions. We culled them yesterday.

Q. Will you please look at Exhibit No. 19 and tell the jury what that is a picture of?

A. That is alongside of the pond. The entrance over the pond.

Q. And does that open out into the sea from down to the river? A. Yes, and up.

(Testimony of Bruno Agostino.)

Q. Is there anything in that that is changed from the time you occupied?

A. No, nothing changed there.

Q. Just the same as it was when you had it?

A. Yes.

Mr. Bell: We offer it.

The Court: It may be admitted. [45]

Q. (By Mr. Bell): I hand you Identification No. 19 and ask you to tell the jury what that is a picture of?

A. That is the Columbia Lumber's machinery on the back end of the pond. They bring it in there.

Q. Was that there at the time you made the deal to sell it to them?

A. No, sir, they bring it afterwards.

Mr. Bell: We offer it in evidence.

The Court: Without objection it is admitted and may be marked as Exhibit No. 19.

Q. (By Mr. Bell): We now hand you Identification No. 20 and ask you to state what that is a picture of?

A. That is the Columbia Lumber Company camp.

Q. Is that a close-up view of the Columbia Lumber Company camp?

A. Set up on the back of the pond after I give them possession.

Q. Was that there at the time you gave them possession?

A. No, sir, they bring it afterwards.

Q. Was that sitting there when you were down

(Testimony of Bruno Agostino.)

there in June? A. Yes, sitting right there.

Mr. Davis: Do you mean May?

Q. (By Mr. Bell): Was that May or June? [46]

A. Latter part of May. We couldn't find out the day when I went there with Mr. Butcher.

Q. It was the day you and Mr. Butcher went there together?

The Court: It may be admitted.

Q. (By Mr. Bell): I hand you Identification No. 22 and ask you to tell them what that is a picture of?

A. That is the garage and the cat in there, you see them through the door and the donkey outside of the door and in front of the garage.

Q. Was that condition the same before you sold it to the Columbia Lumber Company?

A. Yes, sir, that is the way when I sold it.

Q. Was the caterpillar in the garage at the time you turned it over to them? A. Yes.

Mr. Davis: No objection.

Mr. Bell: We offer it in evidence.

The Court: It may be marked Plaintiffs' Exhibit No. 22 and shown to the jury.

Q. (By Mr. Bell): I now hand you Plaintiffs' Exhibit No. 23 and ask you to state what that is if you know?

A. Well, that is the same camp taken from another side—from another angle. [47]

Q. Does any of your old camp show?

A. No.

(Testimony of Bruno Agostino.)

Q. That is all the new camp?

A. That is the new.

The Court: It may be admitted.

Q. (By Mr. Bell): I show you Identification No. 24 and ask you to state to the jury what that is?

A. That is the way it was in the middle of the pond and this is the foreman that I sold—I sold representing Columbia—Mr. Blacky Lambert.

Q. Blacky Lambert, that is his picture in there?

(No response.)

Q. And he was the foreman for the Columbia Lumber Company? A. Yes.

Q. That is his picture on the right side?

A. In the middle of the pond.

Mr. Davis: Your Honor, to keep the record straight, I object to saying that Mr. Lambert was the foreman, was the foreman of the Columbia Lumber Company. He doesn't know whether he was or wasn't.

The Court: Overruled, motion will be denied at this time. The Jury is again instructed that unless it is shown that Lambert had authority to represent the Columbia Lumber Company the testimony cannot be considered. [48]

Q. (By Mr. Bell): I now hand you Plaintiff's Identification No. 25 and ask you to explain to the jury what that is a picture of?

A. That is of the garage, the same garage as is shown on the other picture, with a "D" on the other end—on the west end of the garage, you see.

(Testimony of Bruno Agostino.)

Q. Was that your D-8 caterpillar up to the time you sold to Columbia Lumber Company?

A. Yes, and there is the donkey in front of the yard.

Q. Is that in the same condition that it was prior to the time you sold it to him? A. Yes.

Q. Is the caterpillar in the same place that it was? A. Same place.

Mr. Davis: No objection.

The Court: It may be admitted and marked Plaintiff's No. 25 and exhibited to the jury.

Q. (By Mr. Bell): I hand you a photograph which has been marked Identification No. 26, I will ask you to examine it and state to the jury what it represents and what it is a picture of? That was the front end of the caterpillar? A. Yes.

Q. What building is that sitting in; do you know what the building is? [49]

A. It is sitting up to the Columbia Camp.

Q. Up at the Columbia Camp? A. Yes.

Q. Who took that picture?

A. I took that picture.

Q. Did you take it the same day you took these others?

A. No, sir, I take that the first part of September.

Q. First part of September of what year?

A. 1948.

Q. Is that a fair likeliness of the cat and building as of that date?

(Testimony of Bruno Agostino.)

A. Yes. After they move it up to Columbia that is the way it looked like the way they had it.

Mr. Bell: I now offer in evidence Identification No. 26.

The Court: It may be admitted.

Q. (By Mr. Bell): I now hand you Plaintiffs' Exhibit Identification No. 27 and ask you to examine it and state who took the picture?

A. I took the picture.

Q. And about what date did you take that?

A. That is the same time I take the other.

Q. The last one you referred to? A. Yes.

Q. And that was about when?

A. Around the first of September, 1948. [50]

Q. Now, then, Mr. Agostino, tell the jury what that is a picture of?

A. This is the picture of the cat, D-8, with the arch. The company was working on my cat up to their camp.

Q. What is an "arch"?

A. An arch is something that they lift a big weight and drag it.

Q. Did you have an arch on that cat at the time you sold it to him? A. No, sir.

Q. Who had put that arch on there?

A. The company.

Q. And were the company operating that caterpillar in September, 1948? A. Yes.

Q. At the day that picture was taken?

A. Yes.

(Testimony of Bruno Agostino.)

Mr. Bell: I now offer the picture in evidence.

The Court: It may be admitted and marked Plaintiffs' Exhibit 27.

Q. (By Mr. Bell): I now hand you Identification No. 28 and ask you to state who took that picture? When did you take it?

A. That is the same time that I take the other.

Q. Well, the last group of pictures, you mean?

A. Yes.

Q. Where was that taken?

A. That is up to the Columbia Camp.

Q. Now, what do you see in that picture that you recognize?

A. On this picture here—I take this picture on the Columbia cat and I want to compare it with my cat, D-7, for they are the same size, that is Columbia cat that I had.

Q. You took that picture and this is the Columbia Lumber Company's own cat?

A. Yes, and I wanted to compare it with my D-7 to see if it was the same size.

The Court: It may be admitted and marked.

Q. (By Mr. Bell): I hand you Plaintiffs' Exhibit No. 29 and ask you to state who took that picture? A. I take that picture.

Q. And did you take that in September, 1948?

A. Yes, September, 1948.

Q. What does that picture show?

A. That is my D-7. That is why I take the other picture and compare with this one.

(Testimony of Bruno Agostino.)

Q. You took that at the Columbia Lumber Company camp? A. Yes.

Q. Was that your cat formerly? A. Yes.

Q. Was that in the possession of the Columbia Lumber Company in September, 1948?

A. Yes.

Mr. Bell: We offer it in evidence.

The Court: It may be admitted and may be marked Plaintiffs' Exhibit No. 29 and shown to the jury.

Q. (By Mr. Bell): I hand you Plaintiffs' Exhibit No. 30 and ask you to state who took that picture? A. I took that picture.

Q. And did you take that in September, 1948?

A. Yes.

Q. And what is that a picture of?

A. That picture represented the sawmill.

Q. What else does it represent?

A. That is the foundation of the wheel and the carriage and everything. The truck is complete except for the machinery to run it.

Q. That was taken after you had sold out to the Columbia Lumber Company? A. Yes.

Q. This picture represents a fair condition of it as of that date? A. Yes.

Mr. Bell: I offer that. [53]

The Court: It may be admitted and may be shown to the jury.

Q. (By Mr. Bell): I now hand you Identifica-

(Testimony of Bruno Agostino.)

tion No. 31 and ask you to state if you took that picture? A. Yes.

Q. When did you take that?

A. At the same time. I take it in September of 1948.

Q. Will you tell the jury what you see in that picture that you recognize?

A. Well, I see this, that is chocker and cable and things and materials alongside of the garage.

Q. And whose material were they formerly?

A. Yes.

Q. Were they yours before that?

A. They were mine before I gave it to Columbia.

Q. And that was taken in September——

A. '48.

Q. And was that in possession of the Columbia Lumber Company at that time? A. Yes.

Mr. Bell: I now offer it in evidence.

The Court: It may be admitted.

Q. (By Mr. Bell): I now drop back to the picture identified No. 21 and ask you to state who took that picture? [54]

A. I took that picture at the same time. Here is shown that the door over the garage and the cat was seen in there and here the door to the garage is empty. We pull out everything out of there.

Q. That was your garage? A. Yes.

Q. Prior to March 1st, 1948? A. Yes.

Q. Now in March, 1948 I understood you to say that the cat was in that garage? A. Yes.

(Testimony of Bruno Agostino.)

Q. Now, then, in September when you took this picture, the cat was not there?

A. Cat and everything had been taken out of the garage.

Q. Did you see that particular cat in September, 1948?

A. Yes, show the picture. I take a picture up to their camp, one of the pictures.

Q. Then the caterpillar, as I understand, that was in here in March, 1948, is the cat that you took a picture of up at the Columbia Lumber Company's camp in September, 1948? A. Yes.

Mr. Bell: We offer it in evidence.

Mr. Davis: No objection.

The Court: It may be admitted and may be shown to the jury. [55]

Q. (By Mr. Bell): Mr. Agostino, did you go back to your building, your bunkhouse and cook shack, later after September, 1948?

A. No, sir.

Q. You haven't seen it since then? A. No.

Q. Now, on this trip that you were there September, 1948, was the building empty or occupied?

A. No, it was occupied by Mr. and Mrs. Hooper.

Q. Did you talk to Mr. and Mrs. Hooper?

A. Yes, sir.

Q. Did they state whether or not they were employees of the Columbia Lumber Company at that time?

(Testimony of Bruno Agostino.)

A. Yes, they was employed by Columbia Lumber Company.

Q. I will ask you if Mr. Hooper gave you a paper on that date? A. Yes, sir.

Q. I hand you a paper that has been marked Plaintiff's Identification 32 and ask you to state what that is if you know?

A. Well, I asked him how they authorized to go into that house and they says they are already——

Mr. Boochever: I must object. There is no showing that Hooper has any authority to represent Columbia Lumber and his statement in that connection is hearsay.

The Court: Objection is sustained.

Q. (By Mr. Bell): Who gave you that paper?

A. Mr. Hooper.

Q. Where did he give it to you?

A. In the camp on the Barry Arm.

Q. Was that your old former camp where you lived for years? A. Yes, sir.

Q. And what date did he give it to you?

A. Well, they say August 30, 1948, it must be about August 30th or the 1st of September. Like I said, I went there in the first part of September.

Q. It was either August 30th or September?

A. Yes.

Q. And is it back now in the same condition it was at the time he gave it to you with the exception of the Reporter's mark on it or the Clerk's marks?

A. Yes.

(Testimony of Bruno Agostino.)

Mr. Bell: I now offer it in evidence.

Mr. Boochever: Same objection, the fact that it is just an unsigned written statement just the same as an oral statement.

The Court: Objection must be sustained. The paper may be filed so as to make it a part of the record if counsel desires it.

Mr. Bell: That will be fine.

The Court: I think we may as well suspend at this time until 10 o'clock tomorrow morning. [57]

Ladies and Gentlemen, the trial will be continued until 10 o'clock tomorrow morning. Everytime the jury separates it is the duty of the Judge to tell them—to charge them—that they must not discuss the case among themselves or with others or not listen to any conversation about it or not to form or express an opinion until it is finally submitted to them. So, you will hear that everytime you separate for lunch and the night until the trial is over.

Some of you have been on juries before and know all about it. May I remind the new members of the jury, particularly, that they ought to be careful not to listen to any conversation about the case. Jurors are on oath bound to determine the case upon the evidence they hear in the court room and they should not listen to anything that may be observed or stated by anybody outside.

You may now be excused.

(Testimony of Bruno Agostino.)

Court stands adjourned until tomorrow morning at 10 o'clock.

(Whereupon, at 5 o'clock, p.m., Tuesday, May 31st, 1949, the trial was adjourned until 10 o'clock, a.m. Wednesday, June 1, 1949.) [58]

Wednesday, June 1, 1949

Whereupon, at 10 o'clock, a.m., the above-entitled matter came on for taking of further testimony pursuant to adjournment at 5 o'clock, p.m., Tuesday, May 31, 1949. [59]

The Court: The roll of the jury will be called.

The Clerk: They are all present, Your Honor.

The Court: The witness, Bruno Agostino, will resume the witness stand.

BRUNO AGOSTINO

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Direct Examination

By Mr. Bell:

Q. Mr. Agostino, you referred to the pond in examining those pictures, will you tell the jury what the pond was?

A. The pond is a little lake where we store the logs in.

(Testimony of Bruno Agostino.)

Q. And is that pond surrounded by something during the time you are putting the logs in?

A. It is around by what is called a "boom."

Q. Boom? A. Yes.

Q. How is a boom made?

A. A boom made of logs. Tie one to each other together.

Q. And how are they tied together?

A. With a chain or cable.

Q. On this particular place how did you tie the logs together?

A. Well, that is another boom to put the logs in and tie them together, too. [61]

Q. Now, you do that after you get them all in the water? A. Yes.

Q. Now, how would the boom logs or the stringer around it, how did you fasten them together at your works there?

A. They have got a hole on each end to put the chain in it and that locks them.

Q. I mean the boom logs, you said you fastened them together with a chain or a cable, which method did you use there?

A. You mean the logs—the boom?

Q. The outside boom that you keep in the pond to hold the logs until you are ready to fasten them together?

A. They have got the piling in there and they are still between the piling.

(Testimony of Bruno Agostino.)

Q. Now, Mr. Agostino, how did you fasten the ends of the boom logs together at your place?

A. Well, the chain, Mr. Bell.

Q. With a chain? How long is that chain?

A. About five feet.

Q. And how is it fastened to the logs?

A. It go into one log—I don't know what they call it at the other end—they have the kind of key and that straightened up and put into another log and straightened up into the loop, into the ring.

Q. All of your boom logs were equipped with that kind of equipment? [62] A. Yes.

Q. Was that pond a natural pond or did you dig it? A. That is a natural pond.

Q. Did you do any work on the pond?

A. No, except for the piling to hold a lot of logs in.

Q. In other words, you drove the piling, you mean? A. Yes.

Q. Who drove those pilings?

A. Me and Mr. Socha.

Q. And how many pilings were driven there?

A. Well, I don't know if I give you right number, it is about thirty anyway.

Q. 30? A. Yes.

Q. What are those pilings?

A. Hemlock piling about fifteen feet long.

Q. Hemlock piling about fifteen feet long?

A. Yes.

(Testimony of Bruno Agostino.)

Q. Now, did you have to do any cat work or caterpillar work on this pond, too?

A. No, only we pull the log in with a cat on the low tide and then when the tide is come in we just put them into boom and take them out.

Q. Where was this pond or log pond, as you call it, where was that with reference to your regular camp? [63]

A. It is a thousand feet from the bunkhouse on the east side.

Q. Now, where did you have the conversation with Blacky Lambert and Ted Rowell on or about March 24th, where were you standing or sitting?

A. We were sitting in the little cabin there about 500 feet from the main camp. That is where I was living alone and they came in there and we had all the conversation in there.

Q. That was a little cabin about 50 yards or 50 feet? A. Well, call it 50 yards anyway.

Q. From the main big cabin—big camp?

A. Yes, over a little knoll.

Q. About what time of the day did they come there?

A. Well, I think the first time was about five o'clock at night after noon, p.m.

Q. That was the first trip?

A. That was the first trip.

Q. Now, confine yourself to about the 24th of March, the last trip or the third trip they came, tell us about when that was?

(Testimony of Bruno Agostino.)

A. First trip they came in about 20 March and they come in in the morning and we had a conversation and no can have what they want and they went back and then they came back again and we had a lot of talk again so we agreed. We have the conversation and they went back in on the 24th of March.

Q. Now, on the 24th of March, please tell us what Mr. Lambert said and what you said as near as you can? [64]

Mr. Boochever: Your Honor, for the purpose of the record we wish to interpose an objection as to what Mr. Lambert said.

The Court: Objection will be overruled at this time to await these further developments.

On this 24th of March, was that the third trip?

The Witness: That was the last trip.

The Court: You may answer counsel's question then.

Q. (By Mr. Bell): Now, then, in that conversation you have been asked what Mr. Lambert said, what Mr. Rowell said, and what you said?

A. Yes, the conversation was complete on 24th of March and that is the last time they come in. When they come in the last time the conversation was completed. That is the time I turned the possession of the camp to them.

Q. The word "position" do you mean "possession" do you?

A. Yes, turn the property over.

(Testimony of Bruno Agostino.)

Q. Now, then, tell what Mr. Lambert said, what you said, and what Mr. Ted Rowell said while you were all three together there that morning of the 24th—the day of the 24th?

A. Well, that is, the conversation was through on the third time. They just come in and move into the camp. We don't have any conversation on the 24th of March. The conversation was before.

Q. Now the conversation, the one immediately prior to that, was about the 20th, was it? [65]

A. The 20th and the 22nd and then they went back and they came in with this scow and boat and machinery—the whole outfit that was already settled.

Q. Now, then, what was said in the conversation on the 20th? Now, we hold it to the 20th of March, what was said in that conversation by you persons?

A. In the conversation was going to call Mr. Morgan and tell they can't land there until they buy me out and my price was $25,000—$19,000 for the machinery and $5,000 for the rest of the stuff—$6,000.

Q. Now, then, what did Lambert say when you told him that?

Mr. Boochever: I don't like to—I wonder if counsel would agree that anything Lambert states, any questions of that nature, will be regarded as objected to, subject, of course, to Your Honor's ruling.

Mr. Bell: I will agree that the conversation of

(Testimony of Bruno Agostino.)

Mr. Lambert may be considered objected to up to the time that we put Mr. Lambert on the stand, of course, and then if we qualify him, why——

Mr. Boochever: I just mean in regard to this witness' testimony.

The Court: It is understood and the record will show that all testimony of conversations between this witness and Lambert and Rowell are objected to by the counsel for the defendant.

Mr. Bell: That is all right. [66]

The Court: The objection will be considered overruled and all the testimony will go in under the objection of the defendant.

Mr. Bell: Please read the question.

(Question read.)

The Witness: Well, he went to call Mr. Morgan and came back to me and say Mr. Morgan will come up on the 12th of April and settle with me. So Mr. Morgan did come on the 10th of April.

The Court: What day of April?

The Witness: On the 10th he come up and give orders to start the machinery. So Mr. Lambert he started the machinery, but Mr. Morgan never come back.

Q. (By Mr. Bell): No, now hold yourself to the 20th. I just want to get what was said in each one of the conversations. Now, he said—tell what Lambert said on the 20th and then what you said on the 20th and what Rowell said or anybody else said that was in the conversation?

(Testimony of Bruno Agostino.)

A. Well, when I give the price on my property there they accepted it provided Mr. Morgan accept and they come back and tell me that it is okeh.

Q. Now, he did that on the 20th, all on the 20th, did he? A. Yes.

Q. Now, then, what happened on the 22nd, did you have—— [67]

A. They don't come in; they have to come into Whittier and back to me.

Q. What did they say in the conversation on the 22nd of March?

A. That is when they come back on the 23rd then to move his machinery. 'told me—they come to me and they say everything is all right. The way the conversation was set, and now we go to Hobo Bay and get the company outfit. And I say "Okeh, you have got the full possession."

Q. After they left then on that day, how long was it before they come back with the outfit?

A. About the—about five or six hours, I don't remember exactly, maybe seven hours. They are not very far.

Q. About how far was this bay from your place?

A. I would say ten or twelve miles, not over.

Q. Was that the nearest bay to your place?

A. That is the nearest safest bay to protected by the storms.

Q. And there was no other place, as I understood you to say yesterday, where the company

(Testimony of Bruno Agostino.)

could land and get timber above you without going up Mosquito Creek?

Mr. Davis: Your Honor, I object to that question. In the first place, if he answered the question——

Mr. Bell: I will withdraw the question.

Q. Was there anything said—no, I withdraw it. Was there any other landing where anybody could land their equipment and take out the timber on upper Mosquito Creek other than the [68] place you had your lands? A. No.

Q. Was Mosquito Creek large enough for two logging companies to operate on? A. No.

Q. When your booms were in position could anyone come and go to your camp? A. No, sir.

Q. They completely closed the waters?

A. Yes, sir.

Q. Now, then, when Mr. Morgan came back that was the 10th of April, was it? A. Yes.

Q. Did he come by 'plane or boat?

A. Well, they come there with the boat from Whittier.

Q. And where did the boats stop at that time?

A. Stopped there in the front of my camp.

Q. And that was the 10th of April?

A. Yes.

Q. Now, then, what was said by you and what was said by Mr. Morgan and what was said by Ted Rowell and what was said by Mr. Lambert, if

(Testimony of Bruno Agostino.)

anything? Tell what each one said on that occasion?

A. Well, Mr. Rowell and Mr. Lambert they talk with Mr. Morgan and I don't understand what is the conversation was but I hear they told him to start the machinery and he would be back in [69] two days and he never came back.

Q. Well, did they start the machinery?

A. Yes.

Q. Did it all run? A. Yes.

Q. Then, how long did you wait there for Mr. Morgan to come back? A. A month.

Q. Were they using your machinery and equipment during that time?

A. No, they never used the machinery, Mr. Lambert, no.

Q. He just started it up to try it out?

A. Yes.

Q. Now, then, did they land their houses and things there then? A. I don't understand?

Q. Did they land their scows there then?

A. Yes.

Q. What did they do during that month?

A. Well, they fixed the machinery, that was all the work, waiting for the snow to go out.

Q. Fixed the machinery and waited for the snow to go out? A. Yes.

Q. When did they actually start cutting logs?

A. Well, now, I couldn't tell you that day because after they [70] got the machinery fixed they

(Testimony of Bruno Agostino.)
move in back of the pond and I came in to Anchorage. I don't know when they started to cut the timber.

Q. Did they start using your bunkhouse and cookhouse?

A. No, they never use my cookhouse and bunkhouse.

Q. Not at that time?

A. Not at that time.

Q. When did they start using it?

A. Well, they started using it as soon as Mr. Lambert came out of the camp. They had a new foreman in there and they take everything over and move it out.

Q. Do you know how long Mr. Lambert was in there when he came out?

A. No, I couldn't very well tell the time he was there.

Q. Now, the time that you went back there with Mr. Butcher, was Lambert there then?

A. Yes.

Q. Now, what was he doing at the time?

A. Well, he directing the camp, the logging for the Columbia Lumber Company.

Q. He was director of the camp? A. Yes.

Q. Did you talk to him on that date?

A. Yes.

Q. And were they logging then?

A. Yes, they already was logging. [71]

Q. Did you see any of your cats in operation that day? A. Not that time.

(Testimony of Bruno Agostino.)

Q. Where were they?

A. They was in the garage.

The Court: What time is that?

The Witness: That was the first part of June, 1948, Your Honor.

Q. (By Mr. Bell): First part of June, 1948?

A. Yes.

Q. Now, when did you next go back, Bruno?

A. I went to there the last time was 29th or 30th, I have forgot.

Q. 29th and 30th of August?

A. Of August. I remember I left the camp on the 2nd of September.

Q. And you stayed there until the 2nd of September? A. Yes.

Q. Where did you stay during the time you were there?

A. A little cabin back of the camp. Like I stated, it is prospecting cabin, a small cabin 10 by 12.

Q. A little 10 by 12 cabin, a little prospect cabin back of the camp? A. Yes.

Q. Who built that cabin? [72]

A. I—Mr. Stanley.

Q. You didn't interfere with the camp at all at that time? A. No.

Q. Were they operating the machinery and equipment then? A. Not yet, Mr. Bailey.

Q. Did you ever see them operating any of the machinery?

(Testimony of Bruno Agostino.)

A. The machinery started to operating on about the 11th of July, 1948, when Mr. L. Prout of Grant, that is the time they started moving the machinery and taking possession, using the oil, using the gas and using the bunkhouse.

Q. How much oil and gas did you have there at the time?

A. Well, one barrel of gas full and there was one-half and six barrel of diesel oil.

Q. That was for your caterpillars?

Mr. Davis: How much gas?

Mr. Bell: One and one-half barrel.

The Court: Better let the witness answer.

The Witness: One and one-half barrel gas and six barrel of diesel oil.

Q. (By Mr. Bell): When you were there the last time and took the pictures, I believe you stated that was in with Butcher in June? A. Yes.

Q. Now where were your caterpillars then?

A. In the garage. [73]

Q. In your garage?

A. In my garage, the company garage. I turn over everything to the company.

Q. But what camp were they in—your old camp or their new camp? A. In the old camp.

Q. Were they there then and operating at that place?

A. Yes, they operated back of the pond but they never move them to the camp back out yet until July 11, 1948.

(Testimony of Bruno Agostino.)

Q. And it was July 11th, 1948, before they moved up to their camp? A. Yes.

Q. When you were there did you see your cats in operation? A. Yes.

Q. And all of the equipment was being operated at that time?

Mr. Boochever: Object to that question as leading.

The Court: Objection is sustained.

Q. (By Mr. Bell): What did you see the last time you were there, if time means anything why I will just go on, Your Honor.

A. I went there to look at the camp and see if they had used the machinery or not and I take my camera and taken a picture that the machinery was working up to their camp.

Q. That is the small pictures that you identified yesterday? A. Yes. [74]

Q. Now, about what date was that?

A. What?

Q. What date was that, now?

A. That is about the 30th of August, 1948.

Mr. Bell: Your Honor, we will turn the witness.

The Court: Counsel for defendant may examine.

Cross-Examination

By Mr. Boochever:

Q. Mr. Agostino, I wonder if we could move the lamp and the microphone so that I may see you

(Testimony of Bruno Agostino.)

better. Mr. Agostino, you say that you and Stanley Socha went in there and owned the Barry Arm Camp, is that right? A. Yes.

Q. How about Ray Grasser, didn't he have some interest?

Mr. Bell: I object to that as improper cross-examination.

The Court: Overruled.

Mr. Bell: Exception.

The Witness: Mr. Grasser allowed his right to me and Stanley Socha. We are the two owners of the camp.

Q. (By Mr. Boochever): Didn't Ray Grasser claim to own most of the camp himself?

A. No, sir, we owe him $3300 so he can't claim.

Q. You owe him $3300 on it? A. Yes.

Q. Wasn't he a partner with you in it? [75]

A. He was a partner but withdraw. We make a settlement. He got no interest whatever.

Q. Did you make a written dissolution of the contract? Did you bind it up in writing or what?

A. No, we settled by oral contract.

Q. And did Mr. Grasser agree to the settlement?

A. Why sure, we pay $1700. We have got the check to show that he accept so we did too.

Q. How much did he invest in the property?

A. Why, I don't know what he invested. He invested hardly more than Mr. Stanley did.

Q. How about the cat that was there? I believe it was the D-7?

(Testimony of Bruno Agostino.)

A. That is what invested the money, supposed to have cost him $5,000 and the donkey $4,000.

Q. And that was Mr. Grasser's, is that right?

A. What?

Q. That was Mr. Grasser's, is that right?

A. That was Mr. Grasser but we bought it from him, that is our property.

Q. Did he agree to that?

A. Of course he agree to that.

Q. How come you are sueing him?

A. I sue him because he come there without authority and started to take the machinery. [76]

Q. In fact, Mr. Agostino, he has taken that machinery away now, hasn't he?

A. I don't know, I haven't been in there; after I left it to Mr. Morgan I haven't been in there. I don't know what happened.

Q. And then the other caterpillar you were buying that on a conditional sale contract from Elemar Packing?

Mr. Bell: I object to that for the reason, incompetent, irrelevant and immaterial and not within the issues, nothing pleaded about it, and for the further reason it is not proper cross-examination.

The Court: Overruled.

Mr. Bell: And also on the further grounds that it is requiring the witness to pass upon a legal question as to whether or not the purchase was a conditional sales contract, which is a law question for His Honor to pass upon.

(Testimony of Bruno Agostino.)

The Court: Overruled.

Q. (By Mr. Boochever): Would you answer the question, please?

A. You want me to answer question?

Q. Yes.

A. The cat we considered it paid in 1945 according to the OPA law because we pay $4,000 in cash and 55,000 board feet logs.

Q. Was that under—you had a written conditional sales contract, did you not? [77]

A. Yes, but——

Q. And under that conditional sales contract you still owed money on the cat, is that right?

A. Yes, but that condition——

Q. And you——

Mr. Ross: Let the witness answer.

Mr. Boochever: He answer the question.

Mr. Bell: No, you have interrupted.

The Court: Let him finish his answer if he has further to say.

Q. (By Mr. Boochever): Do you have anything further to say in answer to that question, Mr. Agostino?

A. I wanted to say that that conditional sale, we notified Mr. Brown to come and get the rest of the logs and he never came because we wrote him a letter at the same time that they all lost a thousand dollars under the OPA system, and since that he came in on June, 1947, when Mr. Bent and he wanted to take my cat and I told my cat is here and I say

(Testimony of Bruno Agostino.)

"You can't touch my cat until you pay." There was the bookkeeper and Mr. Bent. After he looked at the cat he took a 'plane to come back to Elemar and I called the bookkeeper and I said he tell Mr. Brown to send a thousand dollars back here or I will go to Anchorage and sue for the money.

Q. And you are sueing them—Elemar Packing Company—aren't [78] you? A. Yes.

Q. Regarding the same?

A. Will you please let me finish my story? As soon as the 'plane went down to Elemar, Mr. Brown came right back and he say "Mr. Agostino, you don't feel very good."

Mr. Boochever: I object to this, Your Honor.

Mr. Bell: He asked for it, Your Honor, let——

The Court: The counsel is completely out of order. Counsel should address the Court and not each other.

Mr. Bell: I move for a mistrial on the remarks of the Court.

The Court: The motion is denied.

Mr. Bell: Exception.

The Court: The witness may complete his answer, and if counsel insists on going into this on cross-examination he must take what he gets from the witness.

Q. (By Mr. Boochever): Will you continue, Mr. Agostino?

A. Mr. Brown come right back to the camp and say "Mr. Agostino, you don't feel so good" and I

(Testimony of Bruno Agostino.)

say "No, Mr. Brown, you don't feel any good either and you send men here to take my cat." And he say "You are going to sue me?" and I say "Yes, if you are going to make trouble like this I am going to sue." And he say "You can't sue me"—no, he say "He don't sue me; let's call everything square and shake hands. You keep what you got [79] and I keep what I got." And he says the loss is a loss for both of us. That is the settlement with Mr. Brown.

Q. But you are sueing Elemar Packing Company on that now, aren't you?

A. Yes, I sue him because he failed to send me the bill of sale. I demand a bill of sale. That is what I sue him for.

Q. Did you tell Mr. Morgan of Columbia Lumber or Mr. Lambert that Elemar Packing Company had never given you a bill of sale for that cat and that they had a conditional sales contract for it?

A. Well, at that time I make a bargain to make this talk of Mr. Lambert, this conversation, Mr. Brown never came. Because I make a contract.

Mr. Boochever: Excuse me, Your Honor, I think the witness should answer my questions instead of going off into long explanation.

Q. The question is, Did you ever tell Mr. Morgan that you had not gotten a bill of sale to the tractor and that the tractor was on a conditional sale from Elemar Packing Company, did you ever tell Mr. Morgan that?

(Testimony of Bruno Agostino.)

A. No, sir. Your Honor, I can't——

The Court: No, just answer the question. You have answered. Your answer is "no" is it? Is it "no" I mean? I am not trying to tell you what to say.

The Witness: No. [80]

Q. (By Mr. Boochever): Did you ever tell Mr. Lambert in March that Mr. Grasser still claimed the tractor and the donkey? A. Yes.

Q. You told him that? A. Yes.

Q. Now, you mentioned your timber rights there, Mr. Agostino, and you said that you had three different timber contracts which you had completely logged, is that right? A. What?

Q. Completely logged off by 1948?

A. No, sir, I have one block never touched in 1948.

Q. How many blocks did you have altogether, sir?

A. Four blocks, three was logged and one never touched.

Q. That is what I understood. And that block which was never touched is still there never touched?

A. Unless cut by Mr. Morgan.

Q. Pardon me?

A. They already cut off by Mr. Morgan's order.

Q. Now, in regard to your timber rights, you have a picture there showing them, is that right?

A. Yes.

Q. And didn't you talk with Mr. Rowell at the

(Testimony of Bruno Agostino.)

end of the 1947 logging season and tell him that you were not going to log any more, that you were through logging? [81]

A. Never tell such a thing, no.

Q. You don't remember saying that?

A. Never tell such a thing.

Q. And didn't you tell him that you couldn't get anyone to go down there and work with you and that you were going to have to give up logging?

A. That is a lie.

Q. You don't remember saying anything of that nature? A. No, sir.

Q. Now, in regard to these timber contracts, where are they now?

A. The Forest Ranger got all of the receipts.

Q. You have a copy of it, have you not?

A. Yes, but I don't bring it here.

Q. Why didn't you bring it to Court so that we could see just what rights you have?

A. I think I have got the last one. I think my attorney has got it.

Mr. Bell: We have got the last one and we will give it to you if you want to see it.

Mr. Boochever: I would like to see it, sir.

Mr. Bell: Please have it marked for identification.

Mr. Boochever: Do you want it marked right now.

Mr. Bell: It should be marked.

The Court: Marked for identification as Defendant's [82] Exhibit "A."

(Testimony of Bruno Agostino.)

Q. (By Mr. Boochever): I show you what purports to be an application for modification of agreement and I ask you is this the last application you made for a timber contract? A. Yes.

Q. Take a look at it first, Mr. Agostino?

A. That is it.

Q. That is the last one? A. Yes.

Mr. Boochever: At this time, Your Honor, I wish to introduce this into evidence.

The Court: Is there objection?

Mr. Bell: No objection.

The Court: It may be admitted and marked defendant's exhibit "A" and may be read to the jury.

Mr. Boochever:

A 10fs-521
June 23, 1945

S
Sales, Chugash (PWS)
Barry Arm Camp
6/23/45

Application for Modification of Agreement

We, the Barry Arm Camp, Territory of Alaska, purchaser of timber in the above designated case, Chugach National Forest, [83] request that the paragraph relating to expiration date in the agreement signed in quadruplicate by us on the 23rd day of June, 1945, be modified to read as follows:

"All timber shall be cut and removed on or before and none later than 12/31/48."

If this application is approved we do hereby agree

(Testimony of Bruno Agostino.)

to cut and remove said timber in strict accordance with all and singular the terms and provisions of the aforesaid contract except as herein modified.

Signed in quintriplicate this .... day of ...., 1948.

BARRY ARM CAMP,
By /s/ BRUNO AGOSTINO,
Partner.

Witnesses

/s/ E. H. O'BRYAN.

Approved at Cordova, Alaska, under the above-conditions this 10th day of July, 1948.

/s/ E. M. JACOBSON,
Division Supervisor.

Q. (By Mr. Boochever): Now, I note that this is the blank day of blank, 1948, when this application was turned in to the Forest Service, Mr. Agostino, actually what was the date, about when was that?

A. That is about the 10th of July, 1948.

Q. About the 10th of July, 1948, was when you made that application [84] for extension of time to cut that timber, is that right?

A. Yes, that is right, but there is——

Mr. Boochever: That is the only question I have.

Mr. Bell: I object to him cutting the witness off.

The Court: Witness may explain.

The Witness: That is for the timber already cut off. The last permit they don't send me the receipt

(Testimony of Bruno Agostino.)

but the check show I paid $250 on October 31st and I don't—I sent the $250 for another 250,000 feet and I got the return of the check, the cashier of the United States Treasurer, but they don't send the sales slip yet.

Q. (By Mr. Boochever): Now, Mr. Agostino, let's get into this year here of 1948, now what time did you stay at the camp all winter? A. Yes.

Q. And you were there in March of 1948?

A. Yes.

Q. Is that right? And then you say early in March Mr. Lambert came up, is that right?

A. Yes.

Q. And you told him to get away?

A. To get what?

Q. Did you tell him to get away from there, that he had no right to come in there?

A. I told him not to land there because he interfere with me. [85] That is correct.

Q. And you said it would interfere with you and for him not to land there? A. Yes.

Q. Did you have a gun with you at the time?

A. No, sir.

Q. Did you threaten to shoot him if he would land? A. No, sir.

Q. Did you threaten to shoot his men if they would land or go around there?

A. No, sir, wouldn't shoot nobody.

Q. Then he came back later, is that right?

A Correct.

(Testimony of Bruno Agostino.)

Q. When he came back later did you tell him he could land at that time or not? A. No, sir.

Q. You told him he could not land?

A. He could not land in there I told him because he would interfere with me.

Q. At that time you had no logs in the pond, is that right? A. Yes, some logs in there.

Q. Just scattered, is that right?

A. That is right.

Q. There was no boom chain running around the complete pond, was there? [86] A. No.

Q. There was nothing going all the way around it and locking it in?

A. The boom was in there only it was broken by the storm.

Q. I think you said there were about 17 or 18 boom logs which were scattered around, is that right?

A. Yes, that was because it was broke.

Q. And that pond the tide comes up in and out of that pond, is that right? A. Correct.

Q. You didn't dig the pond, did you?

A. Correct, no.

Q. It was just a natural pond that is there?

A. Natural pond.

Q. Then you told him that he couldn't come in there and land, right? A. Yes.

Q. What did he do, did he go back again?

A. He told me that maybe the company buy me out if I wanted to let him come in and I told him

(Testimony of Bruno Agostino.)

if the company want to buy me out and pay my price I said you can come in. So he say "I am going to talk with Mr. Morgan" and then he come in back again.

Mr. Boochever: Your Honor, I am in a position here where I have to go into what Mr. Lambert said on cross-examination [87] or else I lose my opportunity to cross-examine the witness, and at the same time I want to have any statements of Mr. Lambert the same objection apply to that, otherwise I am prejudiced in my case, Your Honor, because I can't cross-examine on the point without going into it.

The Court: I don't see how counsel can cross-examine and at the same time make objection to his own questions. Counsel may pursue whatever course he thinks is appropriate, but it would seem inconsistent to ask the witness questions and at the same time take an exception to any statement the plaintiff may make on the subject. If counsel wants to attempt it that will be for another court to pass upon.

Mr. Boochever: Well, Your Honor, I wonder if I couldn't go ahead with cross-examining him without waiving the objection that anything that Mr. Lambert said does not bind Columbia Lumber Company? That would not be inconsistent at all. I want that clear though that it is with that in mind that I am cross-examining him.

(Testimony of Bruno Agostino.)

The Court: Well, counsel may attempt it. I still don't see it. Counsel may pursue his own method of cross-examination within the general rule.

Q. (By Mr. Boochever): Now, Mr. Lambert came back a second time you say, is that right?

A. Yes. [88]

Q. And at that time you told him that you would sell the thing for $25,000? A. Yes.

Q. And for him to go back and see Mr. Morgan about it, is that the way it was? A. Yes.

Q. In that connection just what property did you own there or did you claim to own?

A. I owned the right to use that land and one permit.

Q. Now, you say you owned the right to use the land? A. Yes.

Q. Who gave you that right?

A. That is the Ranger, the Forest Division. I pay the right to use that land. I pay the Government to use that land. He give me the right to use that land.

Q. What he gave you actually was the right to cut the timber off the land, is that right?

A. Yes, and travel all over that land and hold that land.

Q. But not the right to keep anyone else from traversing on that land?

A. I have the channel marked for my own use. Why should another fellow come in there and block me out.

(Testimony of Bruno Agostino.)

Q. Do you have any deed to that land saying you have any right to it?

A. Yes, that receipt you—I gave you is a deed.

Q. That is not a deed; that is merely the right to cut the timber on the land. But you had nothing else to give you—no other instrument other than that—to give you a right to that land, is that right?

A. Well, it seems if you go around the corner you have to take a license. If you don't have a license you can't—if you run a car you have to go and get the license over at the city. Same way if you going to cut log timber you have to get permit from the Land Office of the United States and he gives you a piece of paper.

Q. And you have no other record of title of that land, is that right? A. No.

Q. No other authority than on that?

A. No, just what the government give me.

Q. Now, then, besides that what else did you have in regard to that land?

A. Nothing, the right to cut the timber and sell it. That is the right they usually give to the people.

Q. What other property did you have there, Mr. Agostino?

A. I have a bunkhouse, a cookhouse, machinery and so on.

Q. What machinery did you have?

A. I have D-8 caterpiller.

Q. Is that the one that Elemar is claiming? [90]

A. Yes, and D-7.

(Testimony of Bruno Agostino.)

Q. And is that the one that Grasser is claiming?

A. Yes.

Q. What else did you have?

A. And a diesel engine, about 95-horse power.

Q. Is that the donkey that Grasser is claiming?

A. Correct.

Q. Did you have anything else?

A. We have a lot of stuff—blocks, cable—if you want to take an inventory, I haven't got them here, I can't remember every little thing. We have $15,000 worth of stuff laying there besides the machinery.

Q. Then on March 24th you say Mr. Lambert and Mr. Rowell came back, is that right?

A. Correct.

Q. And you say at that time you gave possession to them?

A. That time they told me they have a talk with Mr. Morgan eight minutes long distance and he told all what I said.

Mr. Boochever: I object to this answer as not responsive to the question.

The Court: Answer the questions, Mr. Agostino.

Mr. Boochever: Read the question.

(Question read.)

A. Yes.

Q. To whom did you give possession? [91]

A. To Mr. Lambert.

Q. To Mr. Lambert? A. Yes.

Q. What did you do? By that you mean you let

(Testimony of Bruno Agostino.)
him land by the pond, is that what you mean by giving possession?

A. The pond. I turned everything to him when I gave him possession. That mean I turn over everything.

Q. You stayed on there, however, didn't you?

A. No, not stay. I tell him I stay in the little cabin, that prospecting cabin 500 yards from the bunkhouse.

Q. Did he go in and take possession of the bunkhouse?

A. No, but he land in that land and he take possession of the camp and he cut my timber.

Q. "He took possession of the camp" by that you mean the camp over the other side of the pond where they put the Columbia Lumber buildings, is that right?

A. No, he take the possession out of the main camp. He go in my garage and get pipewrench and everything he want with the exception of taking the machinery out.

Q. They didn't take the machinery out?

A. No, but they use all the other stuff.

Q. Did they go into your buildings?

A. Yes.

Q. Did they stay in your buildings?

A. No, but they use the building for water house, keeping [92] the stuff in there out of the rain.

Q. Did you give them permission to do that?

A. Correct.

(Testimony of Bruno Agostino.)

Q. And did they take any of your cats and use them at that time?

A. No, not that time.

Q. Did they sleep in your buildings at that time?

A. No.

Q. What they did they walked across where your timber rights were, is that right?

A. They walk across. They go in the bunkhouse. They go in the machinery shop and get what they want and go back in there again, that was it.

Q. Before they would go in to borrow any of this machinery they would secure your permission, wouldn't they? A. No, sir.

Q. Did you tell them they could borrow it?

A. I told them that is that belonged to Columbia Lumber Company when I give them possession. That is their property.

Q. And did they set up a camp on the other side of the pond, is that right?

A. That is later—one month later they set up a camp in there.

Q. They didn't set up a camp in March 24th?

A. No, just landed at my cabin. But they stay there until [93] they move.

Q. What did they stay on the scow—where did they live?

A. They have a house on the scow. They stay there. In and out on the land and on the scow.

Q. They didn't do any operating or working there at that time, though?

(Testimony of Bruno Agostino.)

A. You can't operate there, just fixed the machinery.

Q. They fixed their own machinery?

A. Correct.

Q. They didn't work on your machinery?

A. Correct.

Q. And they didn't take your machinery and do anything? A. Not at that time.

Q. Then, subsequently, you say, in the middle of April Mr. Morgan came, is that right?

A. On the 10th of April.

Q. Now, when Mr. Morgan came did he talk to you at all? A. Yes.

Q. Did you offer to sell him the property at that time? A. *He* already sold to him.

Q. Didn't you say at that time, "I will sell you the property for $19,000"?

A. No such thing, $25,000. He say, "You start the cat and I will come back in two days and we will make a settlement."

Q. Didn't he tell you at that time that the price that you [94] asked at $19,000 was ridiculously high? A. Never did such a thing.

Q. Didn't he tell you that the most it would be worth would be half of that value and as far as he was concerned he didn't need any of that equipment?

(No response.)

Q. The question, Mr. Agostino, didn't he tell you that he didn't want any of your property at all

(Testimony of Bruno Agostino.)

and that the most it would be worth would be about $9,000? A. He never tell me nothing.

Q. And didn't he tell you that there was no deal; that he would not buy that property?

A. He didn't tell me nothing.

Q. Don't you remember him telling you that in the presence of Mr. Rowell and Mr. Lambert there?

A. No, sir, Mr. Lambert was there and he told Mr. Lambert to start the machinery and he would come back in two days and settle with me.

Q. Who told you? A. Mr. Tom Morgan.

Q. Did he come back in two days?

A. Never see that gentleman any more.

Q. Did he ever tell you that he was buying your property?

A. That was already the conversation that he would buy my property, he would. [95]

Q. Did Mr. Morgan ever tell you that he was buying your property? A. Yes.

Q. When? A. At that time.

Q. April 10th? A. April 10th.

Q. A minute ago the only thing he said he was going to go away and come back in two days?

A. Yes, and settle with me in two days.

Q. But he never told you that he agreed to buy that property? A. He did.

Q. What did he say?

A. He said he come back in two days and settle with me. I don't know what it mean in English.

(Testimony of Bruno Agostino.)

Q. He never said, "I will buy your property" or anything like that, did he?

A. The price was already settled. He said he would settle with me. That is all I know about it.

Q. Then you stayed on there, didn't you after that, Mr. Agostino?

A. No, sir, I when I turn it over I stay at my place.

Q. You stayed at Barry Arm at one of the cabins, is that right?

A. Yes, in my little camp waiting for that gentleman and he never come, so I come into town. [96]

Q. So you came into town and it was late in May when you came into town, is that right?

A. Yes.

Q. And you came to see your lawyer, Mr. Butcher, is that right? A. Yes.

Q. And then with Mr. Butcher you got a plane and went back out there around the 1st of June, is that correct? A. Correct.

Q. And when you got out there the first of June Columbia Lumber Company had its camp set up about a half-mile away from yours, is that right?

A. Yes, but they still on my property on the edge of the pond. Yes, that is my property.

Q. That is where they were, but they weren't in your buildings, were they?

A. And they work my permit of the forest and that is where they set their camp in there.

Q. They set their camp up there at the edge of the pond, is that right? A. Yes.

(Testimony of Bruno Agostino.)

Q. As far as your pictures show and all, your cats were just where you left them, weren't they?

A. Yes.

Q. And your buildings were just the way you left them, weren't they? [97] A. Yes.

Q. No one was living in there, were they?

A. Yes. Not at that time, no.

Q. In fact all the men of Mr. Lambert's were over in the Columbia Lumber Company camp?

A. Yes.

Q. And that was at the end of June—first of June? A. Yes.

Q. Now, then, after that you went from there and came back to Anchorage, is that right?

A. Correct.

Q. And you talked with your attorney, Mr. Butcher?

A. We went together and came back together.

Q. And then you decided that you would get hold of Mr. Morgan and make a deal with him to sell the property? A. Right.

Q. And that was in the middle of June?

A. Yes.

Q. So Mr. Butcher called Mr. Morgan on the phone, didn't he? A. Yes.

Q. And told him if he would come up to Anchorage you would make a deal to sell your property, is that right? A. Right.

Q. And he came there at the end of June, didn't he?

(Testimony of Bruno Agostino.)

A. Listen—that is correct. Mr. Butcher called Mr. Morgan. [98] He sent a telegram but Mr. Morgan never come around.

Q. Then Mr. Morgan came up at the end of June didn't he?

A. Mr. Morgan come here, came up the last of June.

Mr. Bell: May I suggest to Mr. Agostino, don't answer so fast. Take your time so the reporter can get it for the record and so the jury can understand it.

The Court: Court will stand in recess until ten minutes past three.

(Short recess.)

By Mr. Boochever:

Q. Mr. Morgan came up at the end of June to Anchorage, didn't he?

A. Why he no come up. We never know when he come up. I don't know.

Q. But he did come up to Anchorage sometime at the end of June, did he not?

A. He come up sometime in June—no, after July he come up.

Q. In July? A. Yes, sometime in July.

Q. Then did he meet with you and with Mr. Butcher in Mr. Butcher's office? A. Yes.

Q. At that time didn't you enter into a contract with Mr. Morgan? A. Yes. [99]

Q. And didn't your attorney, Mr. Butcher, put that contract down in writing? A. Yes.

Q. And didn't you sign that contract?

(Testimony of Bruno Agostino.)

A. Yes.

Q. I show you an instrument which is entitled Sales Agreement.

Mr. Boochever: I would like to have this marked for identification.

The Court: It may be marked as Defendant's Exhibit B.

Q. (By Mr. Boochever): Now, I show you a document marked Sales Agreement, and I ask you whose signature this is marked "Seller" down here?

A. Yes, but I revoke this contract.

The Court: Wait, just answer the question, whose signature is it?

The Witness: Mine.

Q. (By Mr. Boochever): And did you acknowledge that before Mr. Butcher? Is that his signature, do you know? A. Yes.

Q. And you signed this agreement then, right?

A. Yes.

Mr. Bell: May I see the exhibit?

Mr. Boochever: Yes, sir. I wish to offer this in evidence.

Mr. Bell: We have no objection. [100]

The Court: It may be received as Defendant's Exhibit B and may be read to the jury.

Mr. Boochever: Sales Agreement

This agreement, entered into this....day of July, 1948, by and between Bruno Agostino of Anchorage, Alaska, the party of the first part, hereinafter referred to as the seller, and the Columbia Lumber Company, a corporation organized under the laws

(Testimony of Bruno Agostino.)

of the Territory of Alaska, with headquarters at Juneau, the party of the second part, hereinafter referred to as the purchaser,

Witnesseth: Whereas the seller has in the past performed certain logging operations at Barry Arm in the Prince William Sound area under Forest Service permit, and

Whereas the purchaser is now engaged in similar operations at the same place, and

Whereas upon the termination of the logging operations of the seller, he left certain buildings, materials, and equipment at the Barry Arm Camp, and

Whereas, these buildings, materials, and equipment are of value to the purchaser and said purchaser can make use of the same in its logging operations,

Wherefore, it has been mutually agreed that the seller will sell and the purchaser will purchase all those buildings and all of that equipment and all of those materials now located at Barry Arm in the Prince William Sound area and the purchaser [101] will purchase all of the above-mentioned buildings, materials, and equipment for the total sum of Ten Thousand Dollars ($10,000), lawful money of the United States, to be paid by the said purchaser to the seller in accordance with the following terms and conditions:

That following the signing of this instrument and before the 10th day of July, 1948, the purchaser

(Testimony of Bruno Agostino.)

will deposit with the Clerk of the District Court for the Third Division at Anchorage, Alaska, by and through Harold J. Butcher, Attorney for the seller, the sum of Thirty-three Hundred Dollars ($3300.00) which sum is to be held on deposit in escrow by said Clerk of said Court for the purpose of saving the purchaser harmless from any claim made against the seller's camp and equipment and materials the subject of this purchase, by Ray Grasser, who has filed suit seeking from the seller the amount above stated; and it is agreed that the said sum will remain on deposit and will be held in escrow with said Clerk until the litigation between the seller and the said Ray Grasser has been settled by the Court. In the event that the seller is successful and a decision is made in his favor that no monies are due and owing to the said Ray Grasser, then said sum will be turned over to the said seller and if the decision is in favor of Ray Grasser in the sum stated or in any part of said sum, then said sum will be paid over to Ray Grasser by the said Clerk of the Court, or that part required [102] to satisfy said judgment. In the event that there remains monies in the escrow account which are not ordered payable to Ray Grasser by the Court, then such sums shall be made payable upon settlement to the seller herein named.

It is further agreed that on or before the 15th day of July, 1948, the purchaser will pay into the account of the seller at the Bank of Alaska at Anchorage the sum of Seven Hundred Dollars

(Testimony of Bruno Agostino.)

($700.00), and then commencing on or before the 15th day of August, 1948, the sum of One Thousand Dollars ($1,000.00) per month paid in the account as indicated above and the same sum on each subsequent month thereafter until six (6) payments of One Thousand Dollars ($1,000.00) each have been made into the account of the Seller. It is specifically agreed that there shall be no payment of interest on any amount herein stated.

Immediately upon the signing of this instrument by the purchaser and notice of such signing conveyed to the seller or to his attorney, Harold J. Butcher, a bill of sale covering all of the buildings, materials and equipment located at Barry Arm will be placed in escrow at the Bank of Alaska to be delivered to the purchaser upon its making payment in full the purchase price herein set forth.

The seller agrees that upon the execution of this instrument, the said purchaser may take possession of said buildings, materials and equipment located at Barry Arm and make use of [103] the same in such manner as the said purchaser desires, and that for all practical purposes said buildings, materials and equipment will be treated as though full title had passed to the purchaser.

This contract and all its terms and conditions shall inure to and be obligatory upon the parties hereto, their heirs, executors, administrators, successors and assigns.

It is hereby specifically agreed that all the terms and conditions in connection with this contract have

(Testimony of Bruno Agostino.)

been set forth herein and that there are no other agreements, verbal or written, pertaining to this sale or the method of paying for the same on the part of purchaser.

In Witness whereof, the parties hereto have hereunto set their hands and seals this 29th day of July, 1948.

/s/ BRUNO AGOSTINO,
Seller.

COLUMBIA LUMBER
COMPANY,
By /s/ THOS. A. MORGAN,
/s/ Pres.
Title.

United States of America,
Territory of Alaska—ss:

Be it remembered that on this 29th day of July, 1948, before me, the undersigned Notary Public in and for Alaska, personally appeared Bruno Agostino, one of the parties named herein, known [104] to me and to me known to be the seller herein-named, and he acknowledged to me that he signed and executed the foregoing instrument freely and voluntarily for the uses and purposes therein-mentioned.

Witness my hand and official seal the day and year herein-above last written.

[Seal] /s/ HAROLD J. BUTCHER,
Notary Public in and for
Alaska.

My commission expires April 23, 1949.

(Testimony of Bruno Agostino.)

Mr. Boochever: Your Honor, at this time I wish to renew my objection with regard to any oral testimony with regard to any agreement for the sale of this property in that the written agreement is the best evidence and that any oral agreement is in violation of the parole testimony.

The Court: Objection is denied at this time.

Q. (By Mr. Boochever): Mr. Agostino, that contract is dated July 29th, that is in error is it? That is in error, it should be June 29th?

A. (No response.)

Q. It is dated July 29th. Actually, you signed it on June 29th, didn't you?

A. (No response.)

Q. Do you remember that? [105]

A. I don't remember; I guess so.

Q. It was your attorney who prepared that contract, wasn't it, Mr. Butcher? A. Yes.

Q. And you signed it in his presence, didn't you?

A. Yes.

Q. And then your attorney sent it to Mr. Morgan, didn't he? A. (No response.)

Q. He sent the contract to Mr. Morgan for Mr. Morgan's signature, didn't he? A. Yes.

Q. Do you know Mr. Morgan wrote to your attorney and said the contract is——

Mr. Bell: I object to the statement—what he said. You can ask him if he knows whether Mr. Morgan wrote to him or not, not by testifying himself in a question there. Because what he would

(Testimony of Bruno Agostino.)

have written to Mr. Butcher would not be binding on this party until it was conveyed to this party or made known to this party.

The Court: The question is if he knows. Overruled.

Q. (By Mr. Boochever): Do you know if Mr. Morgan wrote to Mr. Butcher telling him that the contract was all okeh except he wanted a list of the specific items which were sold?

A. No, he never did tell that.

Q. You didn't know that? [106]

A. No, sir.

Q. Didn't you then see Mr. Butcher and tell him that you would not agree to making a list of the items and that you would not agree to the selling of one of the cabins there?

A. No, sir, never tell that.

Q. You don't remember that?

A. I don't tell that. I remember I don't tell anything of that kind.

Q. Didn't Mr. Butcher tell you that if you didn't want to go through with it that he would have nothing more to do with the case?

A. I quit Mr. Butcher because Mr. Morgan no sign the contract.

Q. But didn't Mr. Butcher tell you, you should make a list there of the items to go? And you told him that you would not let the cabin go, that you didn't want to sell that? Isn't that right?

(Testimony of Bruno Agostino.)

A. No. Mr. Morgan no want a list because he knows everything that was over there.

Q. I will show you a letter and ask you if you have ever seen a copy?

Mr. Boochever: Do you want to mark this for identification?

The Court: It may be marked for identification as Defendant's Exhibit C.

Q. (By Mr. Boochever): I show you this [107] letter and ask if you ever saw that or discussed the contents of that letter with Mr. Butcher?

A. No, sir.

The Court: Is that a letter or a copy?

Mr. Boochever: That is the original letter, Your Honor.

The Witness: No, sir, I never saw that letter before.

Mr. Bell: May we see it, please?

Mr. Boochever: Your Honor, do you wish that this be left?

The Court: Counsel may keep it if he desires to or he may leave it with the Clerk if he desires to.

Q. (By Mr. Boochever): Now, after that written contract was entered into, that you signed the written contract anyway, you subsequently told Mr. Butcher, didn't you, that you did not want the cabin to be included? A. What? What?

Q. Did not want your cabin to be included?

A. Why that cabin, they never wanted it, they never demanded that cabin; it——

(Testimony of Bruno Agostino.)

The Court: Answer the question.

Q. (By Mr. Boochever): Answer the question.

A. Yes, I told him he could include it if they wanted to.

Q. Didn't you tell Mr. Butcher that you wouldn't put that cabin in? [108] A. No.

Q. And then didn't you refuse to give a list of the items that were to be conveyed?

A. Never asked me.

Q. Did you ever make a bill of sale of the items to be conveyed? A. (No response.)

Q. Do you know what a bill of sale is—a paper saying that you sold them to them?

A. Didn't make no bill of sale.

Q. Now, after that contract you went back to Barry Arm again, didn't you, in August?

A. Yes.

Q. And at that time for the first time your cats were not there and Columbia Lumber had taken over the cats, isn't that right?

A. What time?

Q. At the end of August when you were back there? A. End of March?

Q. End of August? A. Yes.

Q. And that was the first time that Columbia Lumber had your cats, right?

A. Right, but Columbia take it on July 10th or 11th.

Q. Around there and that was when they took it

(Testimony of Bruno Agostino.)
after this written agreement had been signed by you, right? [109] A. Yes.

Q. That was when they took it? A. Yes.

Q. And that was the first time that anyone from Columbia Lumber was living in your camp, right?

A. Yes.

Q. Who was living there?

A. Mr. Morgan himself was there until Mr. Hooper and Mrs. Hooper and a few other fellows, I no get his name.

Q. And you talked with Mr. Hooper while you were there? A. Yes.

Q. And then about the first of September Mr. Hooper told you that Columbia Lumber had given orders that your deal was off and it wasn't going through and for them to leave the property entirely, didn't he?

A. 30th of August was the last I seen him because I never went there any more.

Q. When you saw him didn't he tell you that he had no authority from Columbia Lumber to stay there any longer, that they had told everybody to leave the property then?

A. Never tell me nothing. He said Mr. Morgan give him authority to stay right there and I say "Okeh".

Q. Didn't he ask you for your permit to stay there? A. No, sir.

Q. And didn't you tell him "Yes, you can stay

(Testimony of Bruno Agostino.)
there; I would [110] like to have someone look after the property? A. No, sir.

Q. And at that time you were living in your little cabin, is that right?

A. I live in there two days and then I come to Anchorage.

Q. Did you have Columbia Lumber Company's permission to live in that cabin? A. No.

Q. Did you ask anyone's permission?

A. I went there because I got my pots and clothes in that little cabin and the Company no want the cabin so I stay there.

Q. How long did you stay there?

A. About two days waiting for the return of the plane.

Q. And your clothes were in the cabin all the time until then, is that right?

A. They still there because I was going——.

Q. They are still there?

A. If the Company no throw them out they are still there.

Q. In other words, you still have your clothing and equipment there?

A. I left them there; I don't know if they are there or not.

Q. Now, you said when you were up there in August—in the end of August—you saw your cats?

A. Yes.

Q. And you said they were working. You mean they were working [111] on the cats, don't you?

(Testimony of Bruno Agostino.)

A. What?

Q. When you said the cats were working, what you meant was that the Columbia Lumber men were repairing the cats?

A. No such a thing; they were working on the log. They got the arch on the D- to pull a log at a time and the D-7 to dragging a log, that is what I meant by working.

Q. Don't you know that they returned those cats and put them right back in your property the way they were they this deal fell through? A. No.

Q. So they were placed right there?

A. I don't know.

Mr. Boochever: I would like to look at the picture exhibits, please.

Q. I show you Plaintiffs' Exhibit No. 26 and ask you when that picture was taken, Mr. Agostino?

A. That picture was taken, I have forgot the date now. That is on the first picture.

Q. Was that taken when you were there with Mr. Butcher? A. Yes.

Q. That was taken with Mr. Butcher?

A. Yes.

Q. And then I show you this picture here and ask you when that was taken? [112]

A. That is taken with Mr. Butcher.

Q. Now, that is Plaintiffs' Exhibit No. 29. In other words that was taken around June 1st, is that right? A. Yes, or latter part of May.

Q. Didn't you in your examination yesterday

(Testimony of Bruno Agostino.)

say that that picture was taken on September 1st?

A. There is another bunch been taken on September, that is not that kind.

Q. I believe that yesterday you said that both of these pictures were taken on September 1st?

A. No.

Q. That is wrong? In other words, all the other pictures taken by Mr. Butcher were blown up but these were kept small, is that what you are trying to say? A. Yes.

Q. Then, actually, it was the first of August—the end of August that you first saw Columbia Lumber men using your camp property there other than the fact that they occupied the area by the pond, right? A. Yes.

Mr. Boochever: That is all, Your Honor.

The Court: Any redirect examination?

Redirect Examination

By Mr. Bell:

Q. Mr. Agostino, you testified in an answer to his question [113] about Mr. Butcher calling Mr. Morgan. Now, do you know about what time that was that Mr. Butcher called Mr Morgan?

A. No.

Q. Now, on cross-examination the question was asked you if you didn't have Mr. Butcher to call Mr. Morgan and ask him to come up here to sell him the property, now, did you do that?

(Testimony of Bruno Agostino.)

A. No, sir, not for sale, to settle the contract—to settle the price, but they never came.

Q. Now, up to that did you have any understanding with Mr. Morgan that the original sale was off?

A. No, sir. Mr. Butcher called me here to make a settlement on the sale but Mr. Morgan never came.

Q. Now, then, when you signed this contract that he has introduced in evidence, about what date did you sign it—the date that it shows on it?

A. Well, it was around the 1st of June. It must have been because Mr. Butcher on the 8th of June he went to the convention in Pennsylvania. That is only thing I can remember. I no keep track of things.

Q. Now, Mr. Agostino, will you look at Defendant's Exhibit B and state if it is dated in the same color of ink that you signed it?

A. Yes, they look alike. Here is the 29th day of July, but that is a mistaken.

Q. You think it was before that time? [114]

A. Yes, sir.

Q. Well, but the acknowledgement shows the same date, does it not? A. Yes, sir.

Q. 29th day of July?

A. I was not here in July.

Q. Now, did you ever have any knowledge that Thomas A. Morgan ever signed that contract?

A. He never signed. I revoked that contract because he never come near me.

(Testimony of Bruno Agostino.)

Q. When did you first learn that it was the contention of the defendant that Mr. Morgan had signed this contract?

A. Why, as far as I know he never signed it.

Q. Did you ever know before today that this contract was shown to you, that Thomas A. Morgan had ever signed it? A. No.

Q. Mr. Agostino, I hand you an exhibit that has been marked Plaintiffs' Exhibit Identification No. 33 and I will ask you to look at that and say what that is? Turn it over and examine the face of it and if you can tell what that is?

A. It has got the same date. That is the same contract, I suppose.

Q. Is that an exact copy of the one that counsel for the defendant has introduced in evidence here?

A. (No response.) [115]

Q. I will ask you to compare it with this contract and look at it carefully and see if it is a copy of this one. Check it kind of by paragraphs, Mr. Agostino, on the face. Is it an exact copy of this one?

A. Exact copy of this one. That is the original.

Q. Does it show that you signed the copy—your copy there? A. Yes, sir.

Q. Now, does that show that Mr. Morgan ever signed it?

A. Never signed it; never signed it yet.

Mr. Boochever: I notice one difference in here. This is marked the 5th day of July while the other one is marked the 29th day of July. The original

(Testimony of Bruno Agostino.)

portion is marked the 5th day of July, which is probably more correct on the date. I think the other one is in error.

Mr. Bell: Do we agree that otherwise they are exact copies?

Mr. Boochever: Yes.

Mr. Bell: May I offer in evidence the copy?

The Court: It may be admitted as Plaintiffs' Exhibit No. 33. It may be read to the jury.

Q. (By Mr. Bell): Mr. Agostino, is this the only copy of the contract that you were ever given at any time? A. That is all I got.

Q. Now, that is your signature on it? [116]

A. That is my signature right there.

Q. And it shows an acknowledgement as the 29th day of July, 1948, does it not—the acknowledgement here? A. Yes.

Q. Now, does this copy show that Mr. Morgan ever signed it? A. Never signed it.

Q. And this is the only thing you have ever had?

A. Only thing I have to show.

Q. Would you please tell the jury the circumstances leading up to your signing of those two articles that have just been introduced that you looked at?——

A. Your Honor, can I explain?

Q. ——being the contract offered by the defendant and your copy of the same contract offered by you? Please tell the jury what took place prior to signing those?

(Testimony of Bruno Agostino.)

Mr. Boochever: Your Honor, I object to that, that the contract speaks for itself and it is a complete instrument and states that the Columbia—and states that it includes all agreements.

Mr. Bell: There is no pleading that this contract was ever signed.

Mr. Boochever: It doesn't have to be a pleading, Your Honor, the contract is in evidence and it is a written agreement and speaks for itself. [117]

The Court: Overruled. You may answer.

The Witness: This contract, when I sign it, Mr. Morgan step in just two minutes in Mr. Butcher's office and he make this compromise offer—$10,-000.00. Mr. Butcher draw the contract and give it to me to sign it. I asked him, I say, "When Mr. Morgan come here to sign it?" And he says we send it to Juneau. I sign the contract. I take his advise and sign the contract to send to Juneau and wait one month and never a contract come back, never been signed by Mr. Thomas Morgan. Well, finally, on the 10th of July I went to Whittier and I met Mr. Morgan and I say "How about that contract, are you going to sign it?" And he say "Yes" but never did. I met him again another time up in the Barry Arm, I say "How about that contract?" "Oh," he say "you come to town and I give you the money." I come to town and never see this gentleman and the contract not signed yet.

Q. And, as far as you know, the first time you

(Testimony of Bruno Agostino.)

ever knew that Morgan signed it is this morning when it was shown to you?

Mr. Davis: That question is manifestly leading the witness and I object.

The Court: Objection is sustained; counsel should avoid leading the witness.

Q. (By Mr. Bell): When was the first time that you ever knew that Mr. Morgan ever signed that contract? [118]

A. Well, that was late in September. I met him three time. I met Mr. Morgan and I told Mr. Butcher the contract is out. I will revoke. I will have nothing to do with it because he never pay me one cent and he never sign a contract. I have got nothing to show and I started the suit against him.

The Court: The witness didn't understand your question.

Q. (By Mr. Bell): Now, then, when was the first time—tell the jury the first time that you ever knew that Morgan signed that contract?

A. I know in June and July they don't sign the contract.

Q. Answer the question. When did you first see and know that Mr. Morgan signed the original contract, when did you see that and when did you know?

A. Just now he show it to me. I never see it before.

Q. Up to the time it was shown to you in Court this morning you never knew that Morgan signed it?

(Testimony of Bruno Agostino.)

A. That is right, never seen it before.

Q. Did he ever pay you anything?

A. Never give me a red penny.

Q. What date was it that you talked to Mr. Morgan and told him the deal was off and that you had sued him or did you see him after you had sued him, maybe I misunderstood you, did you see Mr. Morgan after you filed this suit?

A. No, I don't see Mr. Morgan until now in this session of Court. I just notified Mr. Butcher I quit him and I get Mr. [119] Bell and Ross and I started suit against Mr. Morgan for my money.

Q. What was the reason why that you and—what was the reason why you signed the $10,000.00 contract, explain that?

A. Just to avoid the trouble between me and him and take so long a time I would take any offer at that time, but after he fooled me like that I wanted the full amount that we contracted to.

Mr. Bell: That is all.

Recross-Examination

By Mr. Boochever:

Q. Mr. Agostino, you say that Mr. Butcher went away to a convention, is that right? A. Yes.

Q. Now, he went away about July 8th, isn't that it? A. July 8th or June.

Q. Some one of those two months?

A. It was after you signed this written contract, was it?

A. Yes.

(Testimony of Bruno Agostino.)

Q. And he was away for several weeks, wasn't he? A. Yes.

Q. And that is probably why you didn't hear what Mr. Morgan had written him in regard to the contract?

Mr. Bell: I object to that as fairly calling for a conclusion. [120]

The Court: Objection is sustained.

Q. (By Mr. Boochever): But Mr. Butcher was away for several weeks there? A. Yes.

Q. Then when you talked to Mr. Butcher again—

A. Yes.

Q. Remember, now, didn't you tell Mr. Butcher that the small cabin was not to be included?

A. No, sir, never told him that.

Q. You still have your property in that cabin, don't you?

A. I have got nothing but personal property. I got nothing in there but my little blankets, that is all.

Q. And you told Mr. Butcher also at that time that you would not give a list of the equipment that you didn't want to go through with this contract, didn't you?

A. No, sir, Mr. Morgan he no want a list because he knows everything that is in there when we draw the contract. We offer him the list to take an inventory and he won't take it.

Q. I show you Plaintiffs' Exhibit for Identification No. C which purports to be a letter from Mr.

(Testimony of Bruno Agostino.)

Butcher to Mr. Morgan and ask you again if you hadn't discussed that letter with Mr. Butcher?

A. I just never see that letter until just now when you show it to me.

Q. Now, then, you say you quit Mr. Butcher. Isn't it true [121] that Mr. Butcher told you that he would not represent you any further in this because you would not go through with the contract?

A. No, sir, I tell you why he quit me, because he wanted my power of attorney to settle with Mr. Morgan and I refused to give it to him.

Q. You refused to go through with the contract?

A. I refused to give him power of attorney. I don't give nobody power of attorney any more.

Q. So he suggested you go see another attorney?

A. No, he don't have to tell me what I do.

Q. In fact, he recommended that you see Mr. Ross, didn't he?

A. No, sir. He had sent me to, as I say, see Mr. Roley but I tend to my business, I don't have him tell me what to do.

Mr. Boochever: That is all.

(Witness excused.)

Mr. Bell: We want to call Mr. Brunelle, the Clerk of the Court.

The Court: Mr. Brunelle is in Seward.

Mr. Bell: Who does keep the books in there?

The Court: I don't know. Will it be admitted that the money was never deposited with the Clerk's office?

Mr. Boochever: I, frankly, don't know whether that is so or not.

Mr. Davis: Your Honor, Mr. Morgan gave the checks to Mr. [122] McCarrey and he didn't know whether they were actually put in with the Clerk or not.

The Court: Very well.

Mr. Boochever: We will stipulate that it was never paid to the Clerk of the Court.

The Court: Ladies and Gentlemen of the Jury, you may consider this stipulation as conclusive evidence that this money was not placed in the hands of the Clerk as outlined in Defendant's Exhibit B, and counter-part of which is Plaintiffs' Exhibit No. 33.

It is now 12 o'clock and the trial will be continued until two and Ladies and Gentlemen it is my duty to remind you that you should not discuss the case among yourselves or with others or listen to any conversation about it, nor should you form or express an opinion until it is finally submitted to you.

(Whereupon, at 12 o'clock, Noon, the hearing was recessed until 2 o'clock, p.m. the same day.)

Afternoon Session

The Court: Roll of the jury may be called.

(Names of members of the jury were read and answered to.)

The Clerk: They are all present, Your Honor.

The Court: Another witness may be called on behalf of the plaintiff.

Mr. Bell: Mr. Lambert, please.

KENNETH D. LAMBERT

called as a witness, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bell:

Q. State your name, please?

A. Kenneth D. Lambert.

Q. What is your middle initial? A. D.

Q. And are you also known as Blacky Lambert as a nickname? A. Yes.

Q. During the fall of 1947 did you make a timber cruise for the Columbia Lumber Company?

A. Yes.

Q. Who went with you on that trip?

A. Mr. Rowell.

Q. When you returned from the trip did you make a report to the Columbia Lumber Company?

A. Yes.

Q. By whom were you employed to make the trip? A. Mr. George Morgan.

Q. That is George Morgan of the Columbia Lumber Company? A. Yes.

Q. Where, Mr. Lambert, did you go in making that cruise?

(Testimony of Kenneth D. Lambert.)

A. Well, we went to several different places—one to Barry Arm.

Q. Did you make a trip up the Barry Arm area?

A. Yes.

Q. Did you find Mosquito Creek?

A. Approximately three or three and one-half miles.

Q. Up Mosquito Creek? A. Yes.

Q. After you returned did you make a report to Mr. Morgan, you say? A. Yes.

Q. I hand you a paper that has been marked by the Clerk as Plaintiffs' Identification 34 and ask you to state what that is?

A. This is a report that we made on the Barry Arm cruise for timber surveying.

Q. Do you know who typed that?

A. Well, Mr. Morgan, I think, had this typed. We was present at the time. The girl in the Columbia Lumber Company office [125] typed it up.

Q. Where was their office at that time?

A. At Whittier.

Q. And you were given a copy of that report?

A. Yes.

Q. Is that the copy that was given to you?

A. Yes.

Q. Is that in the same condition that it was at the time it was finished? A. Yes.

Q. Outside of the Clerk's stamp on the back?

A. Yes.

(Testimony of Kenneth D. Lambert.)

Mr. Bell: Your Honor, I will not offer it now but will give them a chance to carefully examine it.

Q. Mr. Lambert, on the trip, where did you leave to go on the trip? A. From Whittier.

Q. And how did you go from Whittier to Barry Arm? A. By boat.

Q. And where did you leave the boat?

A. The boat was parked in front of Mr. Agostino's house in the Bay.

Q. How did you go on up through that country?

A. Afoot.

Q. And you went up about three and one-half miles, you say? [126] A. About that, yes.

Q. And did you make a general survey of the timber that could be reached for logging in that area? A. Yes.

Q. Now, that was in the fall, I believe you said, of '47? A. Yes.

Q. Now, when did you next see Barry Arm camp? A. Not until the spring of '48.

Q. Now, at that time in the spring of '48 who were you working for?

A. Columbia Lumber Company.

Q. And in what capacity?

A. Well, in the capacity as a foreman more or less.

Q. Just tell what happened the first day in 1948 that you saw Barry Arm Camp, what you did there?

A. We went up to see if there was any ice in the river to see if we could take the equipment in.

(Testimony of Kenneth D. Lambert.)

Q. Who did you see there?

A. Mr. Agostino.

Q. Did you ever have a conversation with him?

A. Yes.

Q. Will you please tell about what was said by you and what was said by him at that time?

A. Well, Mr. Agostino informed us that we couldn't move the [127] equipment in; that he had a timber sale in there and prior rights to it.

Q. And how long did you talk to him on that occasion? A. Oh, possibly an hour.

Q. And was there anything said in that first conversation about buying Agostino out? A. No.

Q. Now, then, after you went back—left there, where did you go? A. To Whittier.

Q. Who did you report to at Whittier?

A. Mr. Ted Rowell.

Q. In what capacity was Ted Rowell acting?

A. He was a mill superintendent.

Q. For what company?

A. Columbia Lumber Company.

Q. The defendant in this action? A. Yes.

Q. Now, did you tell Ted Rowell what took place between you and Agostino? A. Yes.

Q. What was done then so far as you or Ted Rowell or Mr. Morgan was concerned or officers of the Columbia Lumber Company at that time?

A. Why, we called Mr. Morgan in Juneau, I think was where [128] he was and explained the

(Testimony of Kenneth D. Lambert.)
situation to him and he said that Bruno—Mr. Agostino, rather—had no rights to the timber whatsoever, that they had bought all of the timber rights and that we were to go ahead and move in.

Q. And then did you go back again?

A. Yes.

Q. And did you talk to anyone at that time?

A. We talked to Mr. Agostino.

Q. And where were you when you talked to him the second time? A. At Barry Arm.

Q. Was that near the camp? A. Yes.

Q. What time of day was it?

A. Well, I couldn't say offhand what time of day it was.

Q. About how long after your first trip in was it?

A. Oh, possibly a week.

Q. And about what date would that be?

A. Well, that would be sometime around the 20th of March, approximately there, maybe the 15th, I don't remember exactly.

Q. Now, then, tell us what the conversation was between—wait, I will withdraw that—Who was with you when you went in that time?

A. Mr. Rowell.

Q. That was the foreman or superintendent of the mill for the Columbia Lumber Company? [129]

A. Yes.

Q. What was said in the conversation by Mr. Agostino, yourself and Ted Rowell?

(Testimony of Kenneth D. Lambert.)

A. Well, there was a conversation about moving the equipment in and we explained the situation to him that they had purchased it and Mr. Agostino said they couldn't move in until some provision was made for them buying him out, and that is about the extent of that.

Q. Did Mr. Agostino show you any papers or anything at that time showing that he did have a timber purchase there?

A. Yes, he showed us a telegram he had received from the Forest Service.

Q. Do you remember whether or not he gave you that telegram to take back with you? A. Yes.

Q. And who did you give that telegram to?

A. Mr. Rowell has that telegram in his possession at that time.

Q. Can you rerember the contents of that telegram?

A. Well, not word for word, it was a telegram from the Juneau office stating that he had a continuation of his timber sale of 250,000.

Q. Then what did you do with the boats at the time you and Ted were together there, where did you go after this conversation? [130]

A. We went back to Whittier.

Q. Then did you communicate with Mr. Morgan?

A. Yes.

Q. And was there in this conversation anything said about the price or a sale?

A. I think there was, yes.

(Testimony of Kenneth D. Lambert.)

Q. Can you remember what Agostino said about that?

A. Well, he said that he wanted $19,000 for his equipment plus $6,000 for his buildings.

Q. And did you give that information to Mr. Morgan? A. Yes.

Q. How did you give it to him?

A. I think it was by a wire.

Q. And did you have any telephone conversation with him? A. Oh, yes.

Q. Now, who participated in that telephone conversation?

A. Well, I talked to him and Mr. Rowell talked to him.

Q. You were well acquainted with Mr. Morgan, were you? A. Yes.

Q. Did you know his voice on the 'phone?

A. Oh, yes.

Q. Now, then, please tell the jury what took place in the 'phone conversation?

A. Well, we told Mr. Morgan of the condition —that there was a camp, that Mr. Agostino didn't want us in there and I think we mentioned the price over the 'phone to Mr. Morgan at the [131] time. Mr. Morgan said if he wouldn't let us move in and there was indications of any trouble like that to have him put off, to get the Marshal and have him put off if it was necessary. We didn't want to do that. So, I think—whether it was at that time or whether it was a later date Mr. Mor-

(Testimony of Kenneth D. Lambert.)

gan sent a telegram stating that he would be up and make some kind of arrangements with Bruno—or Mr. Agostino, I should say—and I think that was supposed to have been sometime around the 10th of April.

Q. Now, then, when you went back in the next time, say, the third trip you made in, did Ted Rowell go with you that time?

A. I don't remember whether he was with me or not. I think he was at that time.

Q. Did you have a conversation with Bruno Agostino at that time? A. Yes.

Q. Would you please tell the jury about the date of that as near as you can?

A. Well, it was sometime around the—oh, maybe —possibly around the 25th of March. We told Mr. Agostino then or we showed him the telegram that Mr. Morgan would be up and make some kind of a settlement with him.

Q. Was the amount of the price mentioned in the telegram? A. No.

Q. Then the only price that you knew of was $19,000 for the [132] machinery and equipment and $6,000 for the buildings?

A. That is right.

Q. Now, then, you made the fourth trip in, did you not, with the equipment? A. Yes.

Q. About how many days was it from the third trip that you came back with the equipment?

(Testimony of Kenneth D. Lambert.)

A. Oh, it must have been two or three days anyway.

Q. Now, in the interim between the first trip and the third or fourth trip, do you know whether or not Ted Rowell had tried to get the United States Marshal to dispossess Mr. Agostino there?

A. Yes, he did.

Q. And do you know whether or not the United States Marshal came down there?

A. No, he didn't.

Q. Do you know what happened or took place between Ted Rowell and the United States Marshal?

A. Well, as I was informed on that, the Marshal——

Mr. Boochever: Object to that as hearsay.

The Court: Objection sustained.

Q. (By Mr. Bell): Who were you informed by? A. Mr. Rowell.

Q. Then what did Ted Rowell tell you? [133]

A. Mr. Rowell told me that the Marshal——

Mr. Boochever: Object, Your Honor.

The Court: Objection sustained.

Mr. Bell: It is the manager of the defendant company.

The Court: Objection sustained.

Mr. Bell: Exception. Let me make an offer, then? Do you want me to make it out of the presence of the jury? I offer to prove by this witness that if he were permitted to answer that Ted Rowell made a trip to Anchorage to get the United

(Testimony of Kenneth D. Lambert.)

States Marshal to put Agostino and Mr. Socha or the Barry Arm camp partners off of these premises and that an investigation was made by the Marshal and Mr. Ted Rowell and that the Marshal refused to have anything to do with it and said they were rightfully in possession. That is what Rowell told this witness.

Mr. Boochever: Same objection, hearsay.

The Court: Objection is sustained.

Mr. Bell: Exception.

Q. Mr. Lambert, so far as you know did the United States Marshal come there at all?

A. No, not to my knowledge.

Q. And did you talk to Ted Rowell after his trip to Anchorage?

A. I didn't know that Mr. Rowell came to Anchorage.

Q. Well, did you talk to Ted Rowell after his conference with the United States Marshal? [134]

A. Yes.

Q. Now, then, what did Ted Rowell tell you to do after that?

A. Well, we didn't do anything we called Mr. Morgan on that. He didn't tell me anything to do.

Q. And you called Mr. Morgan? A. Yes.

Q. And where did you call Mr. Morgan?

A. Well, I think it was at Juneau, either called him or sent him a wire, I don't recall what it was now.

Q. Did you inform Mr. Morgan that Agostino re-

(Testimony of Kenneth D. Lambert.)
fused to move? A. Yes.

Q. And then what did Mr. Morgan say?

A. That was the time Mr. Morgan said he would come up and settle—make some settlement with Mr. Agostino.

Q. Then, after that happened did you go back to Agostino? A. Yes.

Q. Did Mr. Rowell go with you? A. Yes.

Q. And did you have a conversation with Mr. Agostino there? A. Yes.

Q. Can you give us approximately the date of that conversation?

A. Well, it is pretty hard. It was sometime in the latter part of March.

Q. Was that there at Barry Arm camp?

A. That was at Barry Arm, yes. [135]

Q. Tell us what was said there between you, Mr. Agostino and Ted Rowell.

A. Well, we informed Mr. Agostino that Mr. Morgan would be up and make some settlement with him. Mr. Agostino said "Go ahead and move in," he would give us free access to the camp ground and everything.

Q. Did you, from your conversations with Mr. Morgan and all of the parties understand that you were to be given possession?

Mr. Boochever: Object to this as leading.

Mr. Bell: At that time—I will withdraw it.

Q. Tell what he said about giving you possession of the premises?

(Testimony of Kenneth D. Lambert.)

A. He just stated we could have possession of all the premises if Mr. Morgan was coming up to make a settlement with him.

Q. There was no other price mentioned except the one you have testified about?

A. That is the only one I know of.

Q. Now, then, did you take possession?

A. Yes.

Q. Now, were you acting for yourself or Columbia Lumber Company at that time?

A. I was acting for the Columbia Lumber Company.

Q. Were you a regularly paid employee of the Columbia Lumber Company at that time?

A. Yes. [136]

Q. Now, after you took possession, what did you do, Mr. Lambert?

A. We unloaded the bunkhouses, and started falling timber, getting ready to log.

Q. And how long did you stay there on the premises after that? A. I stayed until July.

Q. Do you remember approximately what date in July?

A. I think I terminated my contract with the Columbia Lumber Company on the 14th of July.

Q. After that time did you cut timber there for the Columbia Lumber Company? A. No.

Q. At that time you left the Columbia Lumber Company? A. Yes.

Q. Now, had you previous to that time entered

(Testimony of Kenneth D. Lambert.)
into a contract down in Seattle, Washington, for cutting of some timber for the Columbia Lumber Company?

A. Yes, I had, that was in February. I signed a contract with the Columbia Lumber Company in February.

Q. When were you to start cutting the timber for them under the terms of that contract?

A. I think—my production was to start on the 15th of April.

Q. Then, after you did take over this equipment, did you go ahead then with your written contract with them? A. Yes. [137]

Q. And, as I understand, you cut under the written contract then until the time you left there?

A. Yes.

Mr. Davis: Your Honor, I hate to keep objecting but my understanding is that he should ask the witness questions and let him answer.

The Court: Quite right. Objection is sustained. Counsel is requested to conform with the rules.

Q. (By Mr. Bell): Mr. Lambert, what did you take over in the way of equipment when you landed there?

A. It was four bunkhouses and a cookhouse and an A-frame and two yarders on it. You might call it a floater, it is logging equipment.

Q. Were there any bulldozers there?

A. That belonged to the Columbia Lumber Company?

(Testimony of Kenneth D. Lambert.)

Q. No, I mean that belonged to Mr. Agostino and his partner, Mr. Socha?

A. Yes, his equipment was there.

Q. What equipment did you take over from Mr. Agostino and Mr. Socha?

A. I didn't take over any.

Q. Well, you came on the ground and landed your equipment? A. Yes.

Q. Now, from that time on, all you took over was the camp? [138]

A. That was all.

Mr. Boochever: Your Honor, I think that question is ambiguous as to whether he means the Columbia Lumber camp or the Agostino and it should be clarified and I object to it on that ground and move the answer be stricken.

The Court: Overruled.

Mr. Boochever: But he asked him whether he took over the camp and there is clear evidence he landed a camp for Columbia Lumber there and if he means that he took over Agostino's camp that is an entirely different proposition and I think the point should be clarified and that the question is ambiguous as it is and misleading to the jury.

The Court: It can be clarified upon cross-examination.

Mr. Boochever: Very well.

Q. (By Mr. Bell): After you landed there how long did Bruno Agostino or Mr. Socha, either—I don't think Mr. Socha was there, was he?

(Testimony of Kenneth D. Lambert.)

A. No, he was never there.

Q. Now, how long was Bruno Agostino around the place after you landed?

A. I imagine a week or two weeks, something like that, I don't remember exactly how long he was there.

Q. Do you remember where he stayed?

A. He stayed in his own cabin. [139]

Q. Now, how far is his own cabin from the Barry Arm Camp that he had been operating up to that time?

A. Well, they are right in connection.

Q. They are very near—close proximity?

A. His cookhouse and bunkhouse and cabin are right together and there is very little difference in that.

Q. And he stayed in the little cabin?

A. Yes.

Q. What happened to the warehouse and other things there following your landing?

A. I never used any of that as long as I was there.

Q. You didn't individually use any of the stuff?

A. No.

Q. Now, did you take the cats or start them or work with the cats in any way?

A. I started the cats up to inspect them to see what kind of condition they were in and that is all I used them for.

(Testimony of Kenneth D. Lambert.)

Q. Were you there on the 10th of April when Mr. Morgan came there? A. Yes.

Q. Did you hear the conversation between Mr. Morgan and Agostino on that occasion?

A. Yes.

Q. Would you please just tell us in your own words what was said by each of the parties—what you said and what they said? [140]

A. Well, Mr. Agostino offered the equipment and the camp up for sale to Mr. Morgan and I think the price he quoted him then was $19,000 for the equipment plus $6,000 for the buildings and Mr. Morgan refused it on that basis. He said he thought the price was too high but he did and Mr. Agostino said "Make me an offer" and Mr. Morgan said I will pay you $300 a month rent on the equipment until such a time as it was title clear and that was about as far as the conversation went.

Q. What did Agostino say to that?

A. Well, he told Mr. Morgan to make him an offer.

Q. And that is as far as that went?

A. That is as far as that conversation went.

Q. Now, then, was there a later conversation that day with reference to starting the cats and seeing how the equipment would work?

A. Yes, there was.

Q. Who issued that order?

A. Mr. Morgan.

(Testimony of Kenneth D. Lambert.)

Q. Who did he tell that—deliver that order to?

A. To I and Mr. Agostino.

Q. And what did you do following that request?

A. Well, I started the cats up to see what condition they were in and I listed all the parts that were required to put them back in first-class shape and I gave an estimate on it of $10,000 for the repair of the two cats. [141]

Q. That would put them back in excellent condition? A. Yes.

Q. What would be a reasonable—What does a D-8 caterpillar like those cost originally?

A. Well, originally they would cost around $18,000 or something like that new.

Q. And what would a D-7 cost?

A. Well, a little less, possibly $16,000.

Q. What would the donkey engine and—the donkey engine that was there cost?

A. Around $6,000.

Q. Now, I will ask you, Mr. Lambert, if there was some blocks and lines there at the place?

A. Yes.

Q. Did you examine them? A. Yes.

Q. What would you say was the reasonable value of those blocks and lines at Barry Arm camp at that time?

A. Well, all in all, around $1200.

Q. Now, what would you say the donkey engine was worth at the time you examined it there?

A. Oh, $5,000, I guess, $4500 or $5,000.

(Testimony of Kenneth D. Lambert.)

Q. Was there a sled, a big sled on which this donkey was mounted for operating?

A. Yes. [142]

Q. And would you explain to the jury what a sled like that is?

A. Well, a donkey sled is put underneath a yarder for moving through the woods and it is quite a little job to build one of them.

Q. What are they made out of?

A. Out of logs.

Q. And are there any cross-timbers in them?

A. Yes, cross-members and bolts.

Q. What would you say that sled was worth at Barry Arm camp at that date?

Mr. Boochever: Objection. There is no qualification of this witness as to questions of value. He is not qualified to give any estimates as far as we know.

The Court: Objection is sustained until the witness is qualified.

Mr. Bell: I will qualify him.

Q. Mr. Lambert, how long have you been engaged in the logging business?

A. Approximately 20 years.

Q. And all during that time have you operated logging equipment and machinery similar to the equipment used at Barry Arm? A. Yes.

Q. Are you familiar with the value of equipment like the equipment had there by the plaintiffs in this case? [143]

(Testimony of Kenneth D. Lambert.)

A. Yes, I have a little knowledge of it.

Q. And would you please tell us the value of the sled there, in your opinion, the reasonable market value of that sled at the place it was there for the purpose for which it was being used?

A. Well, it cost approximately six to eight-hundred dollars to build a sled of that type.

Q. Was this one in good condtion?

A. Yes.

Q. Now what would you say would be the reasonable market value of those two caterpillars at that time considering the location of them on the grounds where you wanted them for use at that time and their actual reasonable market value at that place?

Mr. Boochever: Your Honor, I object to that question as being partially containing a negative pregnant and containing two or three submatters at the same time.

The Court: Witness may answer.

The Witness: Read the question.

(Question read.)

Mr. Boochever: Your Honor, I wish to again make my objection that there is no evidence here that he wanted them for any use at all.

The Court: That part of the objection is good.

Mr. Bell: Well, I will withdraw that part from the question. [144]

The Court: What was the reasonable market value?

(Testimony of Kenneth D. Lambert.)

The Witness: Well, those two cats—reasonable market value for those—those being of an RD series—those being built—that would make them be worth approximately $5,000 apiece, somewhere in that neighborhood.

Q. (By Mr. Bell): Did you see the sawmill there? A. Yes.

Q. What, in your opinion, was the reasonable market value of that sawmill?

A. I have no knowledge of sawmills at all. I would hesitate to set any value on that.

Q. Did you examine the tools and drill-press and vice and anvil and the miscellaneous tools there? A. Yes.

Q. What would be the reasonable market value of them?

A. Well, I would say all in all the lot that was all in the shop would be around a thousand dollars.

Q. Did you observe the boom logs there?

A. Yes.

Q. About how many were there?

A. I would hesitate to say how many there were there.

Q. Just estimate, would you tell us?

A. There could have been around twenty, I imagine.

Q. And did you notice whether or not they had chains? [145]

A. Some had chains and some didn't.

(Testimony of Kenneth D. Lambert.)

Q. Now, what would be the reasonable market value of the logs and chains—the boom logs and chains that you saw there?

A. Well, chains are worth around $7 apiece but I don't know how many chains was there. I have no knowledge of that at all. And the boom logs, why they are only worth about the scale that is in them.

Q. About how much board measure lumber would they scale?

A. Around 700 feet, I would imagine.

Q. What was the lumber worth per thousand—logs worth per thousand at that place?

A. $21.

Q. What would you say, then, would be the reasonable market value of the boom logs and the chains there that were at the place?

A. Well, that is pretty hard to say what the market value of them would be. It would depend a good deal on the condition of the sticks.

Q. Did you notice the roads that were built there? A. Yes.

Q. Did you go over all of those roads?

A. No, just one of them is all.

Q. And do you know how many others there were that were in the clearings there?

A. Yes, there was three or four roads in there or some branch [146] roads off of there—short roads.

Q. Do you know approximately the cost of

(Testimony of Kenneth D. Lambert.)

biulding logging roads in the logging woods similar to these?

A. Well, it runs pretty high, around a hundred dollars a station.

Q. Around a what?

A. Hundred dollars a station.

Q. What is a station? A. Hundred feet.

Q. About a dollar a foot, then?

A. About a dollar a foot, yes.

Q. Do you know whether or not the bunkhouse was furnished with some beds, mattresses and springs?

A. Yes, there was some springs in there and some mattresses.

Q. Do you know what 250,000 feet of board measure logs would be worth to a man operating a logging business similar to the one they were operating there? What would be the profit in other words out of 250,000 feet of board measure timber standing?

A. Board measure standing?

Q. Yes.

A. That would depend on his method of logging and how much it was going to cost him to take that timber out. It would be pretty hard to estimate until you saw the tract of timber.

Q. Did you see the tract of timber that Bruno had left standing there? [147] A. Yes.

Q. Was that good or bad?

A. It was a fair stand.

(Testimony of Kenneth D. Lambert.)

Q. And was it available? A. Yes.

Q. Now, what would that be worth to a logging man equipped like Bruno was there?

A. Well, it would be worth quite a bit to him. I would hesitate to say how much he would make off of it. It would depend on his method of logging.

Q. What were trap logs selling for at that location at that time?

Mr. Boochever: I object to that question. There is no evidence about trapped logs.

The Court: Objection sustained.

Q. (By Mr. Bell): Were there any of that timber that would make trap logs?

A. Some of it would.

Q. About what portion of that 250,000 feet would make trap logs?

A. Possibly ten-percent of it.

Q. And do you know what the price of trapped logs were at that time at that location.

A. No, I don't.

Q. Do you know what they were when you started cutting there, [148] do you know what they would bring then, which was a month later?

A. Around $45 a thousand.

Q. And what was the market value there at this location of ordinary logs—lumber—logs for lumber at that location?

A. $21 a thousand was what I was getting.

Q. $21 a thousand?

(Testimony of Kenneth D. Lambert.)

The Court: Where was that—standing or in the water?

The Witness: In the water.

Q. (By Mr. Bell): Did you have to pay anything to the Government or were you getting $21 a thousand for cutting timber that the Columbia Lumber Company had acquired?

A. The Columbia Lumber Company paid the stumpage.

Q. And you got $21 a thousand for cutting it and putting it in the water?

A. And rafting it, yes.

Q. Do you know whether or not there was a light plant there at this place?

A. There was a little plant there.

Q. Electric light plant?

A. There was a little battery charger that could be used as a light plant if you packed just a few globes.

Q. It was being used so far as you know there?

A. Yes.

Q. Do you know whether or not there was some oil—fuel oil [149] or diesel oil and some gasoline there?

A. Yes, I borrowed six barrels of oil from Mr. Agostino, also a barrel of gasoline.

Q. And those were used? A. Yes.

Q. Mr. Lambert, after you located there did you ever have any obstruction in any way from

(Testimony of Kenneth D. Lambert.)

Agostino from the use of everything there?

A. No.

Q. Did you feel free to go upon the premises at any time and use anything that you wanted to use?

A. Yes.

Q. Do you know when the cats were put in use?

Mr. Boochever: Object to that as leading.

The Court: Overruled, if they were put in.

Q. (By Mr. Bell): Yes, if they were put in?

A. One of the caterpillars was put in use the day I left. That was all I knew about it.

Q. And that was in July? A. Yes.

Q. Of 1948? A. 1948.

Mr. Boochever: We have no objection to this.

The Court: Is it offered in evidence? [150]

Mr. Bell: It is offered in evidence now.

The Court: Without objection the paper marked for identification as Plaintiff's Exhibit No. 34 is admitted in evdence under that number and may be read to the jury.

Mr. Bell: Barry Arm Cruise.

This area was cruised by Lambert and Rowell on November 10, 11, 12th, 1947. They went up the valley from the protected slough, a distance of 3 and ½ miles on the westerly side of the river. The timber extends a distance of 1,000 to 3,000 feet from the river and for the full distance of 3 and ½ miles. It is predominately spruce but has a heavy percentage of hemlock, possibly twenty-percent in the complete stand. The timber is the

(Testimony of Kenneth D. Lambert.)

finest that has been located or cruised by our organization and is thick and the terrain is practically free from brush.

At the head of the area is a large flat, possibly a mile square, which contains a large portion of this timber and which is easily logged. The total volume of the area cruised will run around fourteen million feet.

In addition to this area located over on the east side of the river is additional timber of a smaller sized timber and the area is not so great as the west side. This was not looked at thoroughly but is believed to be several million additional timber on the east side of this river.

Close examinaton proved that these logs could be floated down this slough with a little preliminary work. [151]

The ground aside from a little soft muskey is gravel and easy traveling for either cat or truck.

This area is protected on all sides from severe storms and the timber is particularly free from cat faces, wind checks, and severe rot.

The method of logging recommended is cold decking with yarders to the spar tree and swung with cats to the slough. Lambert's recommendation is a D-8 cat and arch for each cold deck machine as production could be increased considerably by this method.

This area would be a two or three-year location for camp one equipment, if equipped with cat and

(Testimony of Kenneth D. Lambert.)
arches, as they both are of the opinion winter logging could be done because of the protected nature of the area.

Rafting is at all times protected and with the driving of ten to twelve piling would be a simple matter to raft with the outgoing tide as the slough is from 8 to 10-feet deep depending upon the height of the tide. The tide goes up this slough for a distance of a mile and half. These rafts when completed could be pulled with the camp boat right out through the middle of this stiff boom and tied to a buoy and wait the arrival of the tug boat. Lambert recommends a full crew of the two present donkeys and two cats and arches with ten men on the cutting crew, making a total of 36 men for the camp. With this crew and additional equipment, he says he can guarantee 60,000 daily [152] or 360,000 per week every week. This area can be started by March 15th and the suggestion is that if the sale can be consummated arrangements be made to start moving the camp and machines in to cold deck, pending the arrival of cats and arches on the LCT around 4-1-48. This is by far the best timber and the best logging show yet visited on the west side of Prince William Sound.

Q. (By Mr. Bell): Mr. Lambert, after you started logging there did you find conditions just like you had reported it to them before?

(Testimony of Kenneth D. Lambert.)

A. Yes, they were similar.

Q. And was the timber good at this place?

A. Yes.

Q. Was there any way for two outfits to operate there without one blocking the other?

A. No.

Q. It had to be one exclusive operation?

A. That is right.

Q. And so long as the Barry Arm camp or the plaintiffs in this case were operating, the other people—the other operators—could not get in, is that right?

Mr. Boochever: Your Honor, the same objection I have been making on leading the witness.

Mr. Bell: I will withdraw the question.

Q. Were there any opportunity for other people to get in [153] there so long as Barry Arm camp was operated? A. No.

Q. Mr. Lambert, was the pond, what we call the pond, that Mr. Agostino has been describing to us, was that used for logs by you? A. Yes.

Q. Now, will you describe that pond to the jury?

A. Well, the pond was a little body of water that he had staked with piling all the way around. It was a place to raft his logs in and it was approximately about eight-feet of water in there; at a high tide it was very good rafting ground.

Q. Now, in operating there how did you put the logs in that pond? A. With a cat.

(Testimony of Kenneth D. Lambert.)

Q. And then after you got them in there what did you do with them?

A. We rafted them, put them in a boom.

Q. Would you please tell the jury what you mean by putting them in the boom?

A. Well, a raft of logs are logs that are put up in sections with boom sticks around them for towing to the mill.

Q. Did you do that right along for the Columbia Lumber Company there? A. Yes.

Q. Did they take the logs away? [154]

A. Yes.

Q. About how many feet of logs were taken out at the time you left there in July?

A. Well, I don't remember now off-hand how much I did take out.

Q. Do you know how much was cut up to that time?

Mr. Davis: Now, Your Honor, this is completely irrelevant to the issue of this case. I move that the witness not be allowed to answer that question until clarified.

The Court: I do not see the relevency.

Mr. Bell: All right, Your Honor, I am not pushing.

Q. Do you know whether or not the Columbia Lumber Company had made a purchase of timber up Mosquito Creek prior to your landing there?

A. I understood they had.

(Testimony of Kenneth D. Lambert.)

Q. Do you know whether or not that purchase was made before or after you landed?

A. I understood it was made before I ever went in there.

Q. And do you know how far up Mosquito Creek this purchase extended?

A. I think it was around three miles.

Q. And how far up had you logged off for them at the time you left?

A. At the time that I left——

Mr. Davis: Your Honor, the same objection. I think it [155] has no relevance to this case at all.

The Court: Objection sustained.

Mr. Bell: Exception.

The Court: Exception is noted.

Q. (By Mr. Bell): Mr. Lambert, is Mosquito Creek a navigable stream?

A. No, it would be for rowboats or something like that.

Q. When you started logging there did you log over the 250,000 foot area that Bruno Agostino held?

Mr. Boochever: Object to that question as not being clear what they mean by "logging over"—did he log that area?

Q. (By Mr. Bell): All right, did he log that area?

A. I have no knowledge of knowing what that area is. The Forest Service had never put out any boundaries—any boundary lines there. I un-

(Testimony of Kenneth D. Lambert.)
derstood that the Columbia Lumber Company had a sale.

Q. Did you start at the boundary of the logging woods that had been logged by the Barry Arm people and go on up?

A. Yes, I started right at their last cutting and went from there right on up.

Q. It was a continuous operation?

A. That is right.

Mr. Bell: I think that is all, Your Honor.

The Court: Court will stand in recess until five minutes [156] past three.

(Short recess.)

The Court: The record without objection will show all members of the jury are present. Counsel may proceed.

Cross-Examination

By Mr. Boochever:

Q. Mr. Lambert, I understood you to say that you went up there in March of 1948 up to Barry Arm, is that right, sir? A. Yes.

Q. And at that time you were under a contract with Columbia Lumber Company, is that right?

A. I had signed a contract for them but I at that time was working for wages.

Q. Did you have a contract for wages at that time?

A. No, but I was paid by wages. It was a verbal contract.

Q. With whom? A. With Mr. Morgan.

(Testimony of Kenneth D. Lambert.)

Q. Were you on the Company's payroll?

A. Yes.

Q. And you were paid wages from the Company payroll? A. Yes.

Q. Are you sure of that, Mr. Lambert?

A. Yes.

Q. I want to show you your contract here to refresh your memory, see if you can recognize this document here, sir? [157]

A. (No response.)

Q. Can you identify that document?

A. Yes, that is the contract we signed in Seattle.

Mr. Boochever: At this time I wish to move that this contract be introduced into evidence as Defendant's D.

Mr. Bell: We have no objection.

The Court: Without objection the document may be received as Defendant's Exhibit D and may be read to the jury.

Mr. Boochever: "This contract, entered into between the Columbia Lumber Company of Alaska, hereafter referred to as the Company, and K. D. Lambert, hereafter referred to as the Contractor, . . ."

Q. Are you the one known as K. D. Lambert in this contract? A. Yes.

Mr. Boochever: ". . . is for the purpose of logging for the Company at the Barry Arm site, or other places as designated later, in the Prince William Sound area.

(Testimony of Kenneth D. Lambert.)

"The Company is to turn over to Contractor the complete camp and equipment, known as Camp One, for the express purpose of producing logs to no one but the Company. The terms and conditions of this operation are to be as follows:

"1. The Company hereby agrees that so-called Camp One will be completely equipped, including a camp boat, and other necessary tools and equipment, for the proper production and full operation.

"2. The Company agrees that they will furnish roofing paper and other incidentals necessary to put the camp in livable condition after it is located on a permanent footing. The Company also agrees that they will purchase proper mattresses, blankets, etc., for the camp as well as necessary cooking utensils.

"3. The Company further agrees that the equipment will be in operating condition and will be equipped with new lines and blocks necessary for efficient production of logs.

"4. The Contractor agrees that he will use care and discretion in the operation of this machinery and will see that the machinery is in the same condition at the end of the season as at the start, reasonable wear and tear excepted, or financial provisions made for this repair and overhaul work.

"5. The Contractor agrees that $2 per M shall be held out for the repurchase of blocks, lines, parts, and other equipment that might have to be replaced in the season.

"6. The Contractor agrees that all costs of log-

(Testimony of Kenneth D. Lambert.)

ging will be chargeable to his account except stumpage.

"7. The Contractor agrees to be charged with $100 per month for bookkeeping work in the office at Whittier.

"8. The Contractor agrees to maintain a production of at least 50M per day six days per week from April 15 forward to the end of the season.

"9. The Contractor further agrees, in explanation of above [159] Paragraph No. 6, that transportation costs and all other expenses incurred towards getting crews and supplies, will be charged to him, aside from the freight saved by LCT delivery.

"10. It is mutually agreed that a price of $21 for these logs be paid Contractor, based upon the Forest Service Scale, properly rafted and moored for the company tug to tow. This, less the abovementioned $2 deduction, is to be paid on the net Forest Service Water Scale, on the 10th of the month following delivery.

"11. It is mutually agreed that the Company will work with Contractor regarding the towing of boom sticks and moving of rafts after being finished at camp.

"12. It is mutually agreed that the $2 per M deduction will be returned to the Contractor at the end of the season, less whatever cost is necessary to put the camp equipment and supplies in proper condition.

(Testimony of Kenneth D. Lambert.)

"13. It is mutually agreed that the Company will charge groceries, provisions, and supplies to the Contractor at laid down Whittier cost plus 10% and that shipping tickets or invoice charges shall accompany each and every delivery to said camp. It is also mutually agreed that this is a local condition that must be worked out between the two parties.

"Agreeing to the above conditions and terms of contract, both parties hereto set their hands this 16th day of February, 1948. [160]

"(signed) Geo. W. Morgan, Columbia Lumber Company of Alaska; (signed) K. D. Lambert, K. D. Lambert, Contractor; (signed) C. M. Ring, Witness."

Q. (By Mr. Boochever): Now, Mr. Lambert, in conformity with that contract you hired your own men, did you, to go up there and log for you?

A. Yes.

Q. And you were the boss of those men and in charge of them and could fire them and tell them what to do, is that right? A. Oh, yes.

Q. No one came in and said you do this, that or the other thing with regard to the details of the work? A. No.

Q. Now, you were to start producing as of April 15th under that contract? A. Yes.

Q. And, of course, that would necessitate about a month's preparation, wouldn't it? A. No.

(Testimony of Kenneth D. Lambert.)

Q. About how long would that take, Mr. Lambert? A. Two weeks.

Q. And so you were up there at the end of March there for the purpose of getting ready, is that right?

A. No, for the purpose of moving the camp and the A-frame from Hobo Bay to Barry Arm. The camp and the A-frame, they [161] were about to sink. They were covered by ice and snow. That was what I was sent there for was to get them out.

Q. So you moved those over, is that right?

A. Yes.

Q. The first time you went over there Mr. Agostino wouldn't let you land, is that correct?

A. I went there without the camp. I went there with the boat first.

Q. He told you he would not let you land?

A. Yes.

Q. Isn't it a fact he told you if your men tried to land he would shoot you? A. No.

Q. Did he make it to some of your men?

A. Not to my knowledge.

Q. Then you subsequently went over again with Mr. Rowell, is that right? A. Yes.

Q. And at that time he again said he wouldn't let you land, is that correct? A. Yes.

Q. And then you went back and informed Mr. Morgan about it and said you couldn't land, this man wouldn't let you land? A. That is right.

Q. And Mr. Morgan said, he said—and then

(Testimony of Kenneth D. Lambert.)

did you notify [162] Mr. Agostino that Mr. Morgan would come up to discuss it with him?

A. Yes.

Q. You have never had authority to make——

The Court: I think counsel ought to quote the words.

Q. (By Mr. Boochever): What was the message that you took back from Mr. Morgan?

A. The message I took from Mr. Agostino to Mr. Morgan?

Q. From Mr. Morgan to Mr. Agostino?

A. That he would be up on the 10th of the month.

Q. For what purpose?

A. To make some necessary provision or arrangement, whatever you like, for purchase of his equipment.

Q. Mr. Morgan did not state that he was purchasing equipment at that time, however?

A. No, he did not. He said he would come up and make arrangements.

Q. Then, subsequently, Mr. Morgan came up in April, is that right? A. That is right.

Q. Around the 10th of April?

A. 10th of April.

Q. And in your presence with Mr. Agostino, Mr. Morgan discussed the possible purchase of that equipment, is that right? A. Yes. [163]

Q. And at that time did Mr. Agostino offer the equipment for purchase? A. Yes.

(Testimony of Kenneth D. Lambert.)

Q. And what price did he offer it for?

A. $19,000 for the equipment and $6,000 for the buildings.

Q. Did Mr. Morgan accept or reject that offer?

A. Neither one.

Q. What did he say?

A. He offered him $300 a month rental.

Q. Did he say that he would buy the equipment for that price—in regard to the $19,000 and $6,000. I believe you said before, Mr. Lambert, that he said that was too high a price?

A. He did say it was too high.

Q. So he never accepted that offer?

A. He never accepted the offer.

Q. So he made a counter-offer to lease the equipment for $300 a month, is that right?

A. Until such time as the title was cleared up.

Q. Did Mr. Agostino accept that offer?

A. No, he demanded a third down.

Q. And that was the end of the negotiations, is that right?

A. Until such time as the cats were inspected.

Q. Were the cats inspected? A. Yes.

Q. What did you find about the cats about how much it would [164] take to put them in running order? A. $10,000.

Q. And at that time Columbia Lumber already had cats there at Barry Arm of their own?

A. One cat, yes.

(Testimony of Kenneth D. Lambert.)

Q. Which was suitable to be used in logging, right? A. One cat.

Q. And the Columbia Lumber had its own buildings there, had it not? A. Yes.

Q. Which you, as an independant contractor, took there and were operating, right? A. Yes.

Q. From April 15th on you operated as an independent contractor, is that correct?

A. That is correct.

Q. And not as an agent of Columbia Lumber in any sense of the word? A. That is right.

Q. Mr. Lambert, you said that Mr. Agostino said you could go ahead and take possession, when was that?

A. That was before we took the camp in; that was sometime in March.

Q. Sometime in March? A. Yes. [165]

Q. You went in and you landed your camp—the Columbia Lumber Camp as I understand it—in the pond, is that correct? A. Yes.

Q. And you landed it there at the end of the pond? A. Right.

Q. You did not go over into Agostino's camp at that time and use his camp, did you?

A. No.

Q. You never took possession of that?

A. Only his roads; I used his roads.

Q. You used the road over his lands and that is the only thing you did with regard to his property at all? A. That is right.

(Testimony of Kenneth D. Lambert.)

Q. Now, there was some talk about Mr. Rowell trying to get the Marshal, isn't it true that he tried to get the Marshal so that you could land there, that was what he wanted the Marshal for not to eject Mr. Agostino, to see that Mr. Agostino would let you land?

A. Yes, I guess that was it. He wanted to get permission to get in there on the land.

Q. And that was why he wanted the Marshal there so there would be no fight about getting in on the ground, isn't that right?

A. He tried to get the Marshal to come out and evict Mr. Agostino.

Q. You aren't sure on that? [166]

A. Yes, I am sure.

Q. Wouldn't Mr. Rowell's testimony be controlling in your mind what he did on that?

A. Yes, it would.

Q. Now, you said something about starting the cats there and inspecting them, that was on April 10th I believe when Mr. Morgan was there or about that time? A. Yes.

Q. Was that done with Mr. Agostino's permission? A. Yes.

Q. And that was to inspect them to see about a possible purchase, is that right?

A. Yes, to see how much work it would take to put them in condition.

Q. And that was when you felt it would take

(Testimony of Kenneth D. Lambert.)

$10,000's worth of work to put them in position to use? A. Yes.

Q. You did all your logging and all without the use of Mr. Agostino's cat at all?

A. That is right.

Q. And you got along using the equipment that Columbia Lumber furnished you?

A. The best I could with one cat, yes.

Q. Now, the timber you cut you understood was timber Columbia Lumber had the right to cut, is that right? [167]

Q. And you have never cut any timber knowingly or willingly that belonged to anyone else, is that right? A. Yes.

Q. And Columbia Lumber never gave you authority to cut anyone's timber? A. No.

Mr. Boochever: That is all, Your Honor.

The Court: Any further redirect examination?

Mr. Bell: Yes.

Redirect Examination

By Mr. Bell:

Q. Mr. Lambert, you testified that you worked for the Columbia Lumber Company up until you went to work on your own contract did you not?

A. Yes.

Mr. Davis: Your Honor, I don't think he testified, at any rate the question is leading.

The Court: Objection is sustained. Ask him whether he so testified?

(Testimony of Kenneth D. Lambert.)

Q. (By Mr. Bell): Did you testify that you worked for the Columbia Lumber Company up to the time that you went to work under your contract there? A. Yes.

Q. Did you testify that you were paid a salary from the Columbia [168] Lumber Company up until the time you went to work under your contract? A. Yes, up to the 1st of April.

Q. Were you paid in a check? A. Yes.

Q. Mr. Lambert, I hand you a paper that has been marked Plaintiffs' Exhibit Identification No. 36 and ask you to state, if you know, what that is?

A. Yes, that is a statement from my check.

Q. Now, was that a part of the check that was given to you, was that attached to the check at the time it was given to you? A. Yes.

Q. Is that what is commonly referred to as a voucher? A. Yes, that is a voucher.

Q. And who delivered that to you?

A. Columbia Lumber Company.

Q. Now, I hand you a paper that is marked Plaintiffs' Exhibit Identification 35 and ask you to examine that?

A. Yes, this is for the month of March.

Q. Who did you receive that from?

A. Columbia Lumber Company.

Q. And is it in the same condition it was at the time you received it with the exception of the Clerk's marks? A. Yes.

(Testimony of Kenneth D. Lambert.)

Mr. Bell: We now offer in evidence Identifications 35 [169] and 36.

The Court: Is there objection?

Mr. Boochever: No objection.

The Court: It may be admitted and may be read to the jury.

Mr. Bell: Identification 35:

"Columbia Lumber Co. of Alaska, Whittier, Alaska, Remittance Advice (Detach this stub before depositing), 184 hrs. at 3.00-552.00; 32 hrs. at 4.50-144.00—696.00. Employee K. D. Lambert, Pay period ending 3/31/48, Date of check 4/8/48, total wages 696.00, Social Security 6.96, Withholding tax 93.70, Mess & Com 88.35, 10.80, Total deductions 199.81, Net amount 496.19."

Mr. Bell: Identification 36. Same heading.

"48 hrs. at 3.00-144.00, 8 hrs. at 4.50-36.00—180.00, Employee K. D. Lambert, Pay period ending 2/29/48, Date of check 3/31/48, total wages 180.00, Social Security 1.80, Mess & Com. 45.25, 2.55, total deductions 49.60, net amount 130.40."

Mr. Bell: Mr. Lambert, will you please tell the jury what those two checks were given you for?

A. They are wages for moving the camp from Hobo Bay to Barry Arm.

Q. What was the last date you worked for them in that operation?

A. It was the 31st day of March. [170]

Q. And you did work for them then all the time stated in those checks? A. Yes.

(Testimony of Kenneth D. Lambert.)

Q. Now, were there other checks issued?

A. No.

Q. Those two were all you received?

A. Yes.

Q. And during that period of time were you engaged in their business or your business?

A. In their business.

Q. One other thing, Mr. Lambert, you were asked a question—Did you cut only timber belonging to the Columbia Lumber Company—and you stated you did. Would you state what you mean by that, explain that?

A. Well, it is my belief the Columbia Lumber Company had purchased all of the timber in that area.

Q. Did that include the timber belonging to these plaintiffs?

A. Yes, and included the entire sale to my knowledge.

Q. And that is what you meant then by saying that you cut only timber belonging to them?

A. Yes.

Q. Then, as I understand, then, from the time you landed there on you were under the impression or at least believed that the Columbia Lumber Company had bought out Mr. Socha and Mr. Agostino? [171] A. That is right, yes.

Q. Now, there is one other thing——

Mr. Boochever: Your Honor, I object to that

(Testimony of Kenneth D. Lambert.)
last question as leading and move that the answer be stricken.

The Court: It is too late. Motion denied. The question was asked and answered without objection.

Mr. Davis: He didn't have a chance to object before he answered it.

The Court: There was a perceptible lapse of time between the question and the answer and it was only after that that the motion comes in.

Q. (By Mr. Bell): Mr. Lambert, there was a statement in the contract between you and the Columbia Lumber Company that was read by opposing counsel, it is paragraph 8 of the contract, would you please read that and explain to the jury what that paragraph meant?

Mr. Davis: Your Honor, I believe that the paper itself speaks for itself and I don't believe that the witness should be allowed to testify as to what it means.

The Court: Objection is sustained.

Q. (By Mr. Bell): Mr. Lambert, I believe your contract states that you are to start on the 15th of April, did you start at that time or before?

Mr. Boochever: I object to that question. Your Honor, [172] the contract speaks for itself and it doesn't say that.

Mr. Bell: I will read it and ask him if he did. "The Contractor agrees to maintain a production of at least 50M per day, six days per week, from April the 15th forward to the end of the season."

(Testimony of Kenneth D. Lambert.)

Did you start work on April 15th or did you start at some other period?

A. I started falling timber on the 6th day of April.

Q. From then on you were on your own as a contractor? A. Yes.

Q. You testified you started in working with only one cat, what was the agreement between you as to how many cats you were to have?

A. Two.

Q. And do you know where the other cat was that was to be furnished to you?

A. No, I don't, it was sold in Seattle sometime or other.

Q. Did they have any other cat in that vicinity other than the one you were using except what interest, if any, they had in the caterpillars belonging to the plaintiffs?

Mr. Boochever: Your Honor, I object to this as new matter and not proper redirect.

The Court: Overruled, you may answer.

The Witness: Would you read the question.

(Question read.)

A. No, they didn't. [173]

Mr. Boochever: I must object to that question, too, because it implies that they had an interest in the plaintiffs' caterpillars and that is a double question. I move that the answer be stricken.

The Court: I didn't understand all that question said.

(Testimony of Kenneth D. Lambert.)

Mr. Boochever: The question was "Did they have any other cat in the vicinity except the interest they had in the plaintiffs' cat?" Now the question was a double question and a trick one for that reason because it implied they had an interest in the plaintiffs' cats.

The Court: I remember the question and he said "* * * the interest, if any * * *."

Q. (By Mr. Bell): Did you recommend a D-7 cat or D-8 cat? A. D-8.

Q. Did they furnish you any D-8 cat there?

A. No.

Q. Was it only—Was the only D-8 cat that was in the vicinity of the mouth of Mosquito Creek or the Barry Arm area the cat that was originally owned by the plaintiffs in this action?

A. Yes.

Mr. Bell: That is all, then, Mr. Lambert.

The Court: Any further cross-examination?

Mr. Boochever: Yes, Your Honor.

Recross-Examination

By Mr. Boochever: [174]

Q. Now, in regard to the property of Agostino and Socha, Columbia Lumber in your knowledge and while you were there never purchased that property, is that right? A. That is right.

Mr. Boochever: That is all.

Further Redirect Examination

By Mr. Bell:

Q. Mr. Lambert, did you understand his ques-

(Testimony of Kenneth D. Lambert.)

tion as to whether or not that there was a purchase of this property?

A. Well, there was never any money paid down on it. To my knowledge the purchase had never went through. If it had of went through I would have used Mr. Agostino's cats.

Q. Did you understand his question when he said there was no purchase?

A. Well, there was no purchase as far as I know unless they would actually come out and paid Mr. Agostino. That would of been a purchase, wouldn't it?

Q. Did you understand that there was an agreement to purchase?

A. There was an agreement to.

Q. There was an agreement to pay for it?

A. Right, as far as I know there was never any set price on it but there was an agreement.

Q. Now, in your conversation with Mr. Morgan on the telephone or in the telegrams that you and Mr. Ted Rowell sent him, was the price made known to Mr. Morgan? [175] A. Yes.

Q. And after that was made known to him just tell the jury what Mr. Morgan said for you to do?

A. He sent a wire up and informed I and Mr. Rowell to tell Mr. Agostino that he would be up sometime on the 10th of the month and make arrangements with him for some kind of a settlement.

Q. For some kind of a settlement?

A. That is it.

(Testimony of Kenneth D. Lambert.)

Q. Now, do you remember whether or not the $8,000 cash and part payments for the rest was mentioned in that conversation?

A. What was that?

Q. Do you remember whether or not the $25,000 that was discussed with Mr. Morgan was for all cash or $8,000 of it in cash and the balance for payments?

Mr. Boochever: That is leading, your Honor, and object to it.

The Court: Objection sustained.

Mr. Bell: Exception.

Q. Do you remember how or what was said between you, Mr. Rowell and Mr. Morgan about how the purchase price was to be paid?

A. You mean over-the-phone conversation?

Q. Yes, sir. A. No, I don't. [176]

Q. Were you present at any time when Mr. Morgan made any statements about how it was to be paid? A. No.

Q. Well, do you know what was discussed between Mr. Agostino and Mr. Morgan on April 10th, did you hear that conversation? A. Yes.

Q. Now, was that a part of the conversation there as to how the $25,000 was to be paid?

A. Mr. Agostino gave him the price of $25,000 for the entire lot and Mr. Morgan said it was too much, and through further discussion Mr. Agostino told Mr. Morgan to make me an offer and Mr. Morgan offered him the $300 a month rental on the

(Testimony of Kenneth D. Lambert.)

equipment and Mr. Agostino said he couldn't accept that, that he had to have a third down before he could get a clear title to the property, and that was the extent of the conversation.

Q. And did that conversation prolong any farther at that time?

A. Not to my knowledge, no.

Q. Then, what—how soon after that was it that Mr. Morgan told you to start the machinery and see how it worked?

A. It was sometime later in the afternoon.

Q. But on the same date? A. Same date.

Q. And on the same visit? A. Yes.

Q. And you were already in there and landed at that time and [177] had started your falling timber, hadn't you?

Mr. Davis: Your Honor, that question is definitely leading and I object to it.

The Court: Objection is sustained.

Q. (By Mr. Bell): I will ask it again. Were you already in there at that time? A. Yes.

Q. And had you started falling timber before that time? A. Yes.

The Court: Any further cross-examination?

Further Recross-Examination

By Mr. Boochever:

Q. Were you using Mr. Agostino's equipment before that time? A. No.

Mr. Boochever: That is all.

(Testimony of Kenneth D. Lambert.)

Further Redirect Examination

By Mr. Bell:

Q. Where were you putting the logs?

Mr. Boochever: I object to that as improper re-redirect.

The Court: We have crossed back and forth often enough.

Mr. Bell: He has raised that question. We have got to ask about that pond.

The Court: All right, counsel may proceed. [178]

Q. (By Mr. Bell): Were you using the Barry Arm camp pond? A. Yes.

Mr. Boochever: Object to—implying as to the—there is no evidence as to the pond belonging to any camp.

The Court: Overruled.

Q. (By Mr. Bell): I didn't understand your answer?

A. Yes, we were using the pond.

The Court: No matter whether it is the Barry Arm pond or some other pond you were using the only pond that was around there?

The Witness: That is right.

The Court: Do you wish this witness to remain in attendance the rest of the day?

Mr. Bell: I don't think we will need him the rest of the day.

Mr. Davis: We will excuse him.

The Court: You may be excused the remainder of the day but you had better come around in the morning.

(Witness excused.)

Mr. Ross: Call Mr. Socha.

STANLEY SOCHA

called as a witness herein, being first duly sworn, testified as follows: [179]

Direct Examination

By Mr. Ross:

Q. State your full name to the Court and jury?

A. Stanley Socha.

Q. Mr. Socha, are you a partner with Mr.. Bruno Agostino in the operations or were you a partner in the operations at Barry Arm camp in the logging business? A. Yes, I was.

Q. Did you ever help or assist Mr. Agostino in constructing the camp in which you operated there?

A. Yes, I did.

Q. Was the pond in which you kept your logs there, was that a natural pond altogether?

A. It wasn't at that time.

Q. Well, explain to the Court and the jury what, if you did anything to it, you had to do to it to make it usable?

A. It was a worn-out bay filled up with logs, stumps and God knows what not before the pond was cleared up to be used as a pond.

Q. Well, did you clear it out?

A. Sure we did.

Q. How long did it take you to clear out the place that was used for a log pond?

A. Around the pond it took us from September

(Testimony of Stanley Socha.)
'til the snow left the ground, next build up the road and fixed up the pond.

Q. Did you have to use any cat? [180]

A. Yes, we had to use a cat all the time for roads and the same thing in the pond.

Q. What did it cost you to build that pond, Mr. Socha?

A. Well, I couldn't tell you right now but it took four men, rough estimate—October, November, December, January, February and March—that is about six or seven months' work to build the roads and the pond.

Q. The roads and the pond? A. That is it.

Q. Do you know how much of that time it took to build the pond part, to get the pond usable?

A. I don't remember exactly how much time we put in but we work on the pond off and on at all the time, so everytime a log we had to go back in the pond and fix up the gates.

Q. Did you have to drive any piling there in order to make the pond usable?

A. Yes, we had no pile driver so we dug our holes with a shovel on the low tides when the pond happened to be dry and we put them two in a row about three feet apart, we will say, clear across the pond and had floating logs so that they could raise up and down.

Q. So you are not able to tell the Court and the jury how much you think that it cost to build the pond?

(Testimony of Stanley Socha.)

A. I couldn't tell you, somebody can figure four men's wages and the price of a cat, rough estimate, I wouldn't do that [181] again but we will give a month's time.

Q. Month's time? A. Yes.

Q. During all the controversies or all the conversations surrounding the purchase of Barry Arm campsite by Columbia Lumber Company, were you there during any of the time when that conversation took place? A. No, wasn't there.

Q. Did Mr. Agostino have your consent to take any action he wanted to take in order to sell the Barry Arm camp to the Columbia Lumber Company? A. That is right.

Q. Were you and Mr. Agostino the owners of Barry Arm camp? A. Yes, we were.

Q. In March, 1949? A. Yes.

Q. You were the owners? A. Yes.

Mr. Ross: That is all.

Mr. Boochever: No cross, your Honor.

(Witness excused.)

Mr. Bell: We rest, your Honor.

Mr. Davis: At this time, your Honor, we would like to make some motions and I believe they should be made out of the presence of the jury. [182]

The Court: Jury may retire to the jury room until they are recalled.

Mr. Davis: If the Court please, Mr. Bell and Mr. Ross. The defendant, Columbia Lumber Company, at this time moves for a directed verdict in

this case in favor of the defendant on several different grounds.

In the first place, on the ground that the supposed contract here is apparently an oral contract within the terms of the statute of frauds, by the terms of which the defendant cannot be bound unless there was some memorandum in writing or some consideration paid or unless possession was taken of the property supposedly sold with the intention to take it under this sale.

In the second place, the plaintiffs here have pleaded an oral agreement on or about the 24th day of March of 1948 by the terms of which they claimed that they sold the equipment in question to the defendant on that date for the price of $25,000.

Now, on the state of the record as it now stands, giving the plaintiffs the strongest inference that can be drawn from their evidence, there was no contract entered into on or about the 24th day of March or at any other time until an oral agreement was reached in July or late June of 1948, which agreement was later reduced to writing, at least in part.

The writing was signed by the parties. The consideration was $10,000 not $25,000, and, apparently for some reason, that agreement likewise was not ever consummated and in any event the plaintiffs have not sued here upon that agreement. They have sued specifically on oral agreement entered into between certain parties on the 24th of March or thereabouts.

Now, there isn't a shred of evidence of any kind

to show an oral agreement entered into at any time on or about the 24th of March. The most that can be said from the evidence as we have it is that Mr. Agostino made an offer to sell certain property somewhere in the neighborhood of the 20th of March of 1948; that that offer was communicated to Mr. Morgan and that Mr. Morgan says "I will be up to see if I can settle this matter." That is the best face you can put on the plaintiffs' evidence.

On the 10th of April following the communication of that offer, Mr. Morgan did come up and at that time he specifically rejected the offer as made, said it was too high, that he would not deal on those terms. He offered at that time a counter proposition which Mr. Agostino refused and no contract was reached, no agreement was reached between the parties at all on the best face you can put on the plaintiffs' evidence.

Now, the plaintiffs here have also sued on some sort of a goods-sold-and-delivered proposition in their cause of action No. 3, and there has been considerable evidence introduced here to try to show that Columbia Lumber Company used the plaintiffs' equipment and that therefore they must be stuck for the reasonable [184] value of that equipment. I suppose that is the theory we are working under here since there certainly was not any consummated—the minds of the parties never met at any time upon an agreement as to a price.

Now, so far as that goes, your Honor, the only evidence here is that Columbia Lumber never at

any time took possession of any of the equipment in question.

There is some evidence at this time that Mr. Lambert, an independent contractor, did use certain roads which Mr. Agostino says belonged to him. And there is some evidence that the independ*a*nt contractor, Mr. Lambert, did use a certain pond which Mr. Agostino says was his pond. Now, your Honor, of course, knows what the law is and unless I am mistaken the law is that all parties in common have the right to use titles and that no one party can put a boom across tideland and say "This is mine; everybody else has got to stay out" but that is what the plaintiff is trying to do here and that is the real basis for his claim.

He has tried, he has pounded away here and there with various witnesses but he hasn't been able to show at all that Mr. Lambert used anything that he calls "his" except these ponds and these roads.

The roads were on Public Domain. They, as your Honor, can see from the plat, are not on any claim of Mr. Agostino's that he had any right to claim as exclusive possession. They are [185] not within the limits of his timber claims. His timber claims were off to the left somewhere.

The best that can be said is that Mr. Agostino squatted on public ground for the purpose of logging public ground, and that another contractor getting out logs for Columbia Lumber used roads crossing that ground and used a tidewater pond in getting out logs under an independent contract he has with Columbia Lumber.

Now, certainly, as Mr. Agostino said, as seems to be the evidence here, you can't come on—you can't go into this ground that you have under lease from the Government without my permission or without buying me out. The most charitable thing that we can say is that Mr. Agostino was mistaken as to his rights. Certainly the law would have allowed them to use the tidelands to get to their property whether Agostino wanted to or not, and if there was a boom across there, there isn't any evidence that there was, but if there had been any boom across the mouth of the creek so that they couldn't get in, they would be entitled to move the boom so that they could get in.

It might be questionable as to whether they would have the right to use the roads across the ground that Agostino had pre-empted in order to get access to the lands farther up the creek, I don't know, but at any rate if the roads were used they were used by Mr. Lambert in his independ*a*nt contract. [186] Because, apparently in hauling the houses and the equipment up to the Columbia Lumber Company—the so-called Columbia Lumber Company—actually it was actually a Lambert camp, in hauling the buildings up to that site they went up the creek and unloaded up there at the pond which, I say, they had a perfect right to do.

It appears to me that there is a complete failure of proof on the part of the plaintiffs either to show any oral agreement at all—on the contrary, they have shown there wasn't any oral agreement. They

haven't showed any quota of merit or goods having been sold and goods delivered as between Columbia Lumber and Mr. Agostino and they haven't pleaded the contract which actually was later signed. Had they done so we would have had some defenses to that contract, but this suit isn't about that contract at all apparently.

Thank you, your Honor. [187]

* * *

The Court: The first cause of action of the plaintiffs' amended complaint in this action is based upon an alleged contract of purchase and sale and is, as I understand it, it is pleaded under the statute.

The third cause of action, which is the only one remaining other than the first since the second was ordered stricken, is based upon, as I understand it, the common law pleading of indebitatus, that is, being indebted he assumed or promised to pay. But in the third cause of action a number of the paragraphs in the first cause of action are adopted by reference and therefore the third cause of action and the first cause of action, as I concede them to be, are not widely different and in some aspects identical.

There is, as I understand the amended complaint, at this time no cause of action which is analogous to the common law plea of quantum meruit or quantum valebat. Quantum meruit, I suppose, being roughly translated "as much as he deserved" and quantum valebat "as much as they were worth." The latter is the one that is ordinarily used or the

form of it is ordinarily used where the pleading is for a sale for the reasonable value thereof where there is no specific expressed agreement as to the purchase price.

I have examined the pleadings particularly to see if either the first or the third cause of action could be construed as a cause of action based upon the reasonable price of the property sold and delivered, if any was sold and delivered. In my judgment, although it is a serious thing to interfere with the putting of a case to the jury, upon any cause of action there is not sufficient evidence to warrant putting the case to the jury [203] upon the first cause of action as an agreed contract of purchase and sale for the agreed price of $25,000.

As has been pointed out, neither Mr. Lambert nor Mr. Rowell is authorized to make any contract upon the responsibility of either on behalf of the Columbia Lumber Company. The most that they could do would be to carry messages from Mr. Agostino to the Columbia Lumber Company office and bring a message back, and that is precisely what they did. - The testimony of Mr. Agostino and Mr. Lambert is not entirely harmonious but in most respect it is substantially so and out of it all I am convinced that there is enough to go to the jury on a contract of purchase and sale for a reasonable price. It would be analogous to my going into a grocery store and buying a sack of flour and taking it away without saying anything about the price. I would be liable for the reasonable price.

In this case there was a discussion into the price but the parties evidently didn't agree upon the price, but the Columbia Lumber Company did agree to take over the property and accepted possession of it and in that respect I am convinced that Mr. Lambert was their agent and having accepted possession of the property they are bound to pay the reasonable value thereof.

Not only was Mr. Lambert their agent but this whole scheme was confirmed by Mr. Morgan when he came to the property on [204] the 10th of April. He didn't then reject anything except the price of $25,000. He didn't tell his people to go away and not bother Mr. Agostino any more. He was quite willing to take everything that Agostino could give and take his chances on payment of it later in some fashion; get it as cheap as he can, which, I suppose, is legitimate business. But he cannot be permitted to get all the benefits that Agostino could give him and then walk away saying "I am not bound to pay anything" and "You will have to look to some independ*a*nt contractor or to the man in the moon for your pay" and "It isn't worth anything." In my judgment, before the thing can go to the jury there must be an amended pleading that will set out the date that an agreement was entered into— the plaintiffs sold and delivered to the defendant and the defendant accepted certain property including the timber permit and other things of the reasonable value of whatever the plaintiffs claim the

reasonable value is and then the matter will be up to the jury to fix the reasonable value.

That is my view of the case at present and counsel may have until tomorrow morning to file an amended pleading in which they can keep their present two causes of action, if they wish to, but there must be a cause of action based upon a sale and delivery for reasonable value.

Then, by appropriate instructions the jury will be asked to find the reasonable value of the property delivered to the [205] defendant, if any was delivered.

The motion for an instructed verdict is denied and the jury may be recalled.

Mr. Davis: Before the jury is recalled, your Honor, did you say that the first cause of action was not to go to the jury?

The Court: The first cause of action, as I conceive it to be, cannot go to the jury.

Mr. Davis: Then in the event an amended complaint is filed, it should not include the first cause of action?

The Court: That is—my view is that the amended complaint should not include the first cause of action.

Mr. Bell: Your Honor, may we do that by supplemental complaint or should there be filed an amended complaint?

The Court: It can be done by a supplemental complaint but in that event the supplemental complaint alone will go to the jury.

The answer interposed may be considered an answer to the supplemental complaint if counsel so desire.

Mr. Davis: If we desire to file an answer we may have it to file?

The Court: Yes, the amended answer now on file can be considered as an answer to the supplemental complaint, if counsel wish. However, there will be some difference in paragraphing and so on so perhaps after the supplemental answer is filed counsel [206] will desire to file an answer and time will be afforded for that.

Mr. Davis: I asked the Court as to whether under his ruling—. While I am at it, your Honor, I think the same thing is true as to the third cause of action as it now stands?

The Court: As the third cause of action now stands I think it ought not to go to the jury because it incorporates the provisions of the first cause of action with respect to the contract of purchase and sale for the specific sum of $25,000. The third cause of action is one, as I pointed out, of , assumes that being indebted they promise to pay. The third cause of action by amendment could stand but as it is now stated it ought not to go to the jury and I think I shall not permit it to go to the jury.

Mr. Davis: We can have the usual exceptions to the Court's rulings?

The Court: Exceptions will be noted.

Jury may be recalled.

The record will show all members of the jury present. Defendant may call a witness.

Mr. Boochever: Mr. Jacobsen.

E. M. JACOBSEN

called as a witness herein, being duly sworn, testified as follows: [207]

Direct Examination

By Mr. Boochever:

Q. What is your name, sir?

A. E. M. Jacobsen.

Q. What is your occupation?

A. I am Supervisor for the Forest Service.

Q. Have you been subpoenaed to appear as a witness here? A. I have.

Q. Who subpoenaed you?

A. The plaintiff.

Q. Now, Mr. Jacobsen, are you the Supervisor of the area where Barry Arm is located?

A. Yes, I am.

Q. Are you familiar with who have been granted timber rights in that area? A. Yes.

Q. Has the Columbia Lumber Company or was the Columbia Lumber Company granted an extensive timber right there early in 1948?

A. What do you mean "extended?"

Q. Extensive—a large timber right?

A. Yes.

Q. Did they have the right to go in there to cut that timber?

(Testimony of E. M. Jacobsen.)

Mr. Bell: I object to that as a conclusion of the witness.

The Court: Overruled. [208]

Q. (By Mr. Boochever): They did have the right, you say, to go in there and cut that timber?

Mr. Bell: I object to that as leading and suggestive.

The Court: Read the question.

(Question read.)

The Witness: Yes.

Mr. Bell: Wait a minute. I object and ask that his answer be stricken. Your Honor has asked that it be read and now he has answered the question and I move that the answer be stricken.

The Court: The objection is overruled and the motion is denied.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Mr. Jacobsen, do you know whether Mr. Agostino and Mr. Socha had timber rights in there?

Mr. Bell: I object to that for the same reason—because that would be a conclusion of whether they had rights in there. He would be passing on the laws of the land and it would be equal to Russia.

The Court: No, he can tell what he knows of the facts as far as his office is concerned or his department is concerned.

Q. (By Mr. Boochever): What is a timber right, Mr. Jacobsen?

(Testimony of E. M. Jacobsen.)

The Court: I think a "right" is the wrong permit; isn't [209] it "permits"?

The Witness: It doesn't make much difference whether we call it a right. They are granted a privilege to cut the timber on the lands.

Q. (By Mr. Boochever): Who owns the title to that land? A. The Government.

Q. The United States Forest Service acting for the Government grants various people permission to cut timber on that? A. Yes, sir.

Q. Mr. Jacobsen, you say the Columbia Lumber Company did have a permit to go in there and cut timber in 1948? A. They did have.

Q. In Barry Arm area? A. Yes.

Q. I will show you a map which was drawn by Mr. Agostino and is marked Plaintiffs' Exhibit for Identification No. 2, and it purports to represent Mr. Agostino's camp at Barry Arm and some other property there, and ask you to look at this map and see if you can tell what it is about there first and orient yourself with it?

A. I have seen a lot of maps and I never seen one without an arrow showing directions before, so I can't orient myself too well with it.

The Court: Do the jurors hear the witness?

The Witness: I believe that this is supposed to be Mosquito [210] Creek. It is labeled Mosquito Creek running through here. I think it is oriented this way—the way it lies before me, which is fine.

Q. (By Mr. Boochever): Now, according to

(Testimony of E. M. Jacobsen.)

that map there are some blocks marked out here as being Agostino's timber that he had the right from the Forest Service to cut, would you say whether or not that is approximately where his timber permit began the right to cut?

A. Yes, it is not correct by any means but it is an idea.

Q. Approximately where was the area that Columbia Lumber had the right to cut?

A. Well, that is beyond up anywhere else but this area.

Q. In other words, just about all the other timber in that area? A. Correct.

Q. Before Columbia Lumber had that right was that advertised for sale by the Forest Service for bids?

A. Advertised 31 days according to law.

Q. And anyone could bid on that—could have bid on that if he desired? A. Yes.

Q. But Columbia Lumber Company was awarded that contract, is that correct? A. Right. [211]

Q. Permit, I believe, would be the correct word?

The Court: What is the technical name, do you call it a——

The Witness: It is a contract. It is a permit if it is a less amount than 100 dollars and it is a sales agreement in an amount of 100 to 500 and it becomes an advertised contract over 500 dollars stumpage value.

The Court: Anything further?

(Testimony of E. M. Jacobsen.)

Q. (By Mr. Boochever): Do you know whether Mr. Agostino's timber there that he had the permit to cut has been cut now?

A. It is not completed.

Q. There is still some of that that has never been cut? A. It is still pending.

Q. That means it has never been cut to your knowledge to date, is that right? A. Yes.

Mr. Boochever: That is all, Your Honor.

Cross-Examination

By Mr. Bell:

Q. You have known Agostino for quite a number of years, haven't you? A. I have.

Q. He has been cutting timber at that place since 1944, hasn't he?

A. I think that is correct. [212]

Q. Or '45, possibly?

A. '44—'43, the sale was first made, yes, '44.

Q. And he cut in 1945, '46 and '47, didn't he?

A. Yes, sir.

Q. I hand you a paper that has been identified as Defendant's Identification A. I will ask you to state whose signature that is at the bottom of that instrument? A. That is my signature.

The Court: I think that has been admitted, Mr. Bell.

Mr. Bell: It has been, Your Honor.

The Court: It is Defendant's Exhibit A.

Mr. Bell: It is. I apologize. It says "Identifi-

(Testimony of E. M. Jacobsen.)

cation" and then it says "Exhibit". That is my mistake.

Q. That is your signature on that?

A. Yes.

Q. That is what is termed a right to cut timber, isn't it?

A. No, that is a modification of the original timber sale.

Q. It is an extension of timber sales?

A. Yes.

Q. Now, then, that extends this—you intended by this, then, as I understand it, all timbers shall be cut and removed on or before and none later than December 31, 1948?

A. That is correct.

Q. And he had a perfect right to cut timber until December 31, 1948, didn't he? [213]

A. Yes, sir.

Q. Now, then, you are familiar with the location there at the mouth of Mosquito Creek, aren't you?

A. I am.

Q. Can you get your big boat in there only at high tide?

A. Well, I wouldn't want to navigate that creek at any time.

Q. Did you ever take your big boat in?

A. Never.

Q. How do you go in?

A. Go in by small skiff.

Q. You tie your big boat outside? A. Yes.

(Testimony of E. M. Jacobsen.)

Q. Is that the only available way of getting in to the timber that lies above and beyond the mouth of Mosquito Creek?

A. Yes, that is the only available way to get in.

Q. And Agostino and Mr. Socha had been operating at that place for several—three or four years, haven't they? A. Yes.

Q. You have seen their camp there, haven't you?

A. Yes.

Q. It was a nice camp, wasn't it?

A. Very fine camp.

Q. I will ask you to look at this letter and state, if you know, what it is. I will have it marked Plaintiffs' Exhibit Identification No. 37. Do you recognize that letter? [214] A. Yes.

Q. Who wrote the letter? A. I did.

Q. And that was mailed to those people or delivered personally to Herman H. Ross, was it not?

A. Yes.

Q. And that letter speaks the truth, doesn't it, it does as far as it could be? A. Yes.

Mr. Bell: I now offer it in evidence.

Mr. Boochever: Your Honor, I object to it as irrelevant and immaterial. I don't think there is any relevancy to that letter.

The Court: I will be glad to hear from counsel but at the present moment I do not see the relevency of it.

Mr. Bell: Very well, please allow me an objection.

(Testimony of E. M. Jacobsen.)

The Court: Objection is sustained but it may be filed to become a part of the record. Has it been marked for identification?

Mr. Bell: Yes, sir, Plaintiffs' Exhibit Identification No. 37.

The Court: It may be filed.

Q. (By Mr. Bell): Do you know who has had possession of the premises at the mouth of Mosquito Creek since March or April of 1948? [215]

A. No. No, not to be sure.

Q. Have you been in there several times?

A. I have been in there twice this year.

Q. Were you in there quite a number of times last year? A. Once only, I believe.

Q. And what was the occasion for your going in then?

A. When—last year or this year?

A. Last year?

A. Last year I made an inspection of the areas.

Q. Did you go on the ground at the old Barry Arm Camp?

A. No, I don't believe I did. I went up the creek up the river with a small boat.

Q. And how far up the river can you go with a small boat?

A. Depending on the state of the tide.

Q. Well, how far did you go that time?

A. With the high tide you can go up to the Columbia Lumber camp which is on way up the

(Testimony of E. M. Jacobsen.)

creek, I would say a half to three-quarters of a mile up from the mouth of the creek.

Q. Half to three-quarters of a mile from the mouth of the creek? A. Yes.

Q. Have you been around the house of Bruno Agostino or Mr. Socha and Mr. Agostino this year?

A. I have.

Q. Who is in that place now? [216]

A. The Columbia Lumber Company watchman was there when I last visited. Yes, that is right.

Q. And when was that?

A. I wish I could recall the date.

Q. Well, the approximate date?

A. I came very unprepared because I didn't know what was going to be asked of me.

Q. Approximately?

A. A month or so ago.

Q. It would be possibly March or April of this year that the Columbia Lumber Company watchman was there, is that right?

A. I would say the first part of May.

Q. Of May? A. Yes.

Q. Do you know who this watchman is?

A. It is Mr. Hooper—Mr. and Mrs. Hooper.

Q. And do you know where the sawmill is now? Did you see the sawmill that Mr. Agostino and Mr. Socha had in there? Did you see that this trip in?

A. Yes, I did.

Q. Where is that?

A. That is on a point of land about 600 to 800 feet away from the camp—from Bruno's camp.

(Testimony of E. M. Jacobsen.)

Q. And this watchman that you are speaking of, did you talk with him? [217] A. I did.

Q. And is he still an employee of the Columbia Lumber Company? A. He is.

Q. Do you know how much timber the Columbia Lumber Company took out of there?

Mr. Davis: Your Honor, I think that is purely irrelevant.

The Court: I think it may have some bearing; at any rate, the objection is overruled. It may be admitted.

The Witness: Less than two million felled and taken out. I cannot give you it exact.

Q. (By Mr. Bell): Wasn't it—to refresh your memory—wasn't it around three million feet?

A. Beg your pardon?

A. Wasn't it three million feet that they took out?

A. No, I don't think it was that much taken out.

Q. They are not cutting there, are they?

A. They are cutting there now.

Q. They are still cutting?

A. They are still cutting.

Q. And are they still using Mosquito Creek for their inlet and outlet? A. Yes, sir.

Q. Do they use the same logging pond?

A. The same as what? [218]

Q. The logging pond or the pond that was used by Agostino and Mr. Socha?

A. No, they used the mouth of the creek.

(Testimony of E. M. Jacobsen.)

Q. They have got a place down at the mouth of the creek that they stop the whole creek up, you mean?

A. Well, the water runs freely underneath the logs, if that is what you mean.

Q. Do their logs go down below the pond that was made by Agostino and Mr. Socha and go on down below, do they? A. Yes.

Q. They are using all of the creek now?

A. I think I am safe in saying that, yes.

Q. And how far up the creek have they cut the timber?

A. Mile and one-half—mile and one-quarter.

Q. How far up the creek do they have the right to cut the timber?

A. I believe it is very close to three miles.

Q. And you stated that Agostino's timber was not quite all cut, what do you mean by that?

A. May I answer that question in my own way?

Q. Sure, you just tell us.

A. The first sale was made to Mr. Agostino or, rather, to M. A. Jacobs, and it was in the amount of $500 stumpage value, which is a half-million feet. It was not marked except by natural [219] boundaries. It was from a point of land to an old cut-over area. The next sale was around the point and up to a little lagoon or inlet and I think that is what you had reference to a little while ago which was called their booming grounds. Does that explain it?

Q. Is there piling driven in there—piling set in?

(Testimony of E. M. Jacobsen.)

A. Yes, hand-set piling in there.

Q. And that is where they boomed their logs?

A. That is where Mr. Agostino and his associate boomed their logs, yes.

Q. Now, they had another 250,000 feet to cut according to that statement that you signed there. That gave an extension until December 31, 1948 to cut? A. Yes.

Q. Now, did the Columbia Lumber Company then when they came in and took over, did they cut or are they the only people that have cut—ever cut any logs in there since?

A. Yes, they are the only people.

Q. And whatever part of the area that was allowed to Mr. Socha and Mr. Agostino, if any logs have been cut it has been cut by the Columbia Lumber Company? A. Definitely, yes.

Q. And has it pretty well been cut over—the whole area up for a mile and one-half?

Mr. Davis: I object to that last—the mile and one-half [220] has nothing to do with the Agostino and Socha——

Mr. Bell: He is confusing the issue.

Q. Has the area for a mile or mile and one-half up the creek above the Socha camp been pretty well cut over? A. No.

Q. There are some logs in there yet?

A. I don't expect they will finish this year.

Q. Are they cutting in there now?

A. They are working in there, yes.

(Testimony of E. M. Jacobsen.)

The Court: I think we had better suspend until tomorrow morning. The trial will be continued until tomorrow morning at 10 o'clock and in the meantime I am obliged to charge you again that you ought not to discuss the case among yourselfs or with others or listen to any conversation about it and not form or express an opinion until it is finally submitted to you. Court now stands adjourned until 10 o'clock tomorrow morning.

(Whereupon, at 5:00 p.m., Wednesday, June 1, 1949, the hearing was adjourned until 10:00 a.m. the following day.)

Thursday, June 2, 1949

(Whereupon, at 10:00 a.m., the above-entitled matter came on for taking of testimony.)

The Court: Roll may be called of the regular jury.

(Names of members of the jury were called and answered to.)

The Clerk: They are all present, Your Honor.

The Court: Mr. Jacobsen may resume the witness stand. Counsel may inquire.

Mr. Davis: If the Court please, I have some requests that I would like to make to the Court and I think probably should be made outside the hearing of the jury.

The Court: Jury may retire to the jury room until recalled.

Mr. Davis: If the Court please, at 10 o'clock—

about two minutes ago—we were served with a proposed amended complaint in this case. We have read it hurridly but, of course, not thoroughly. During the night and in view of the Court's ruling yesterday we have attempted to draw an answer to the proposed second amended complaint, of course shooting in the dark as we didn't know exactly what was going to be in it. We found we ran into all kinds of difficulty in trying to make that pleadings, and, as we see the pleadings, we have here, it is apparent we are going to have to make motions to strike—other motions against the complaint as filed, and it is apparent that we are going to have to proceed on an entirely different theory from what we proceeded on in the case up to now. Accordingly, in view of the Court's ruling on the motions I made yesterday and the complaint which we now have, at this time I would like to [224] move the Court for entry of a non-suit against the plaintiffs in this case without prejudice in the plaintiffs if they care to do so to commence an action on this theory that they are now proceeding under or such other theory as they may see fit. The reason for that is, as will be apparent from a reading of the pleadings, the new complaint is on an entirely different theory from anything to which we previously proceeded or which we previously pleaded. It is a different theory from what we were following at the time we cross-examined witnesses who had previously been heard. It is on the theory which will

require us to secure evidence which we do not have here at this time, which we could not have expected to be required to meet under the pleadings and the state of the record as it was at the start of the trial and evidence which will take us a little while to get together.

It seems to me the proper way now in view of the ruling of the Court is that this trial be declared a non-suit and let the plaintiffs file a complaint, if they care to do so, and let us then make our pleadings in the usual course and then go to trial on that theory. I feel that we would be damaged beyond repair to try to go ahead with this trial on the new theory. I don't see how we possibly can be called upon to meet the theory here presented. I would like at this time to make that motion.

The Court: The motion will be denied for the reason that [225] counsel had every right to anticipate that that might be the ruling of the Court and, in fact, in counsel's argument yesterday I recall he explicitly stated that he thought that the third cause of action, as stated in the plaintiff's amended complaint, was based upon the theory of reasonable value. I disagreed with counsel then and I do now. But now that an amended complaint has been filed based upon reasonable value and in no other way departing from the original complaint I believe it would be a denial of justice to dismiss it and compel the plaintiffs to start all over. In fact, our modern theory of pleadings is all against it and that would have been necessary 200 years ago but it isn't necessary now and the motion is denied.

Mr. Davis: Your Honor, I may have said yesterday I thought the third cause of action was an action for reasonable value. If I so said I mis-stated. I didn't think it was a cause for reasonable value; I thought it was an action for goods sold and delivered. I thought that was what I said. At any rate there wasn't anything in that cause of action at all which had anything to do with reasonable value.

The whole theory of the case was that there was a set contract at $25,000. Now, we come to Court anticipating that we would be able to show that there wasn't any oral contract made on or about March 24th for $25,000, and I think—and the Court has so ruled—that we have shown that there wasn't any [226] such contract and it appears to me at this time to require us to go ahead on an entirely different theory of reasonable value is asking more of us than we should be required to bear. Now, if the Court's ruling is to stand, and as I suppose it will, then I would ask that this matter be continued to allow us time to plead to this complaint and make a motion, if we see that motions are necessary to the complaint, and to get in a proper answer to that complaint and to allow the plaintiffs then to file reply, if they care to do so.

Now, I agree with the Court that we are not acting under the old strict rules of common law pleadings where if a person sued for goods sold and delivered and it turned out that what he was actually sueing for was money—That was thrown out of Court. I agree, we are not operating under those rules. But

the whole function of proceedings is to notify the parties as to what is to be required on a suit and to boil down the issues so we don't go here and there in the Court room in all directions, so that we will have some idea what theory we are following, and I believe it is absolutely improper to allow the plaintiff at this stage to change his theory entirely as he has done and require us to meet that theory in the middle of the trial.

The Court: The plaintiff is simply filing a complaint to meet the testimony given. The Court requires it, otherwise some other disposition would have had to be made of the action. I [227] don't believe the defendant is being put under any burden at all. The defendant had every right to face whatever issue might arise legally out of the facts of the case.

How much time does counsel require to file motions and other things?

Mr. Davis: Your Honor, I think if we may have until this afternoon at two o'clock we may by that time have our motions and a proposed answer to this complaint.

The Court: That request will be granted and the jury will be recalled.

Mr. Davis: The record, of course, Your Honor, will show the usual exceptions to the ruling?

The Court: Yes, but counsel in order to protect his record may take all the exceptions that he deems are necessary. Record will show that the defendant excepts to all the rulings of the Court.

Record will show without objection that all members of the jury are present.

Ladies and Gentlemen of the Jury, yesterday in your absence arguments were had upon questions of law with which you have no concern now, and as a result of a decision made by the Court after hearing arguments upon the questions of law then presented the plaintiffs have filed a second amended complaint in this action. The defendant requires time to make adequate and proper response to the second amended complaint and for that reason [228] the trial of the case will be suspended until 2 o'clock this afternoon. Please report again at 2 o'clock this afternoon, and you may now be excused until that hour. In the meantime, remember your duty not to discuss the case among yourselves or with others and not to listen to any conversations about it and not to form or express an opinion until it is finally submitted to you. That is all, you may now retire.

(Whereupon, at 10:30 a.m., Thursday, June 2, 1949, the hearing was adjourned until 2:00 p.m. the same day.)

Afternoon Session

The Court: Roll of the jury may be called.

(Names of the members of the jury were called and answered to.)

The Clerk: They are all present, Your Honor.

The Court: Is counsel ready to proceed?

Mr. Bell: We are ready.

Mr. Boochever: Your Honor, in accordance with your instructions we now file motions against the amended pleadings which are before the Court.

The Court: Do counsel wish to argue?

Mr. Davis: I think, Your Honor, at least they should be considered outside the presence of the jury.

The Court: Jury may retire to the jury room until recalled.

Mr. Boochever: Your Honor, this motion is three different points to it.

First point, with regard to paragraph 6, there is an allegation that paragraph 6 of the amended complaint states as follows: "* * * That by reason thereof, the defendant is justly indebted to the plaintiffs in the sum of $37,412.00 but plaintiffs seek to recover only the sum of $25,000.00; * * *". The reference there $37,412.00 is irrelevant and immaterial since they are sueing for $25,000 and we move that it be stricken for that reason.

In regard to paragraph 5 of the complaint, there is [230] reference made to selling the property to the defendant and giving the property to the defendant at its request possession of all of the above-described property. It alleges that this occurred on or about the 24th day of March, 1948. We feel we are entitled to know to whom of the defendant corporation it is claimed that this property was sold, to whom it was given, the name of the individual, and what authority that such individual claimed to have to represent the defendant Com-

pany in that matter, and we feel we should know in that regard who they are relying on in sitting up that cause of action.

Then in regard to paragraph 6 we make a similar motion in regard to the demand that is alleged to have been made on the defendant for the payment. We want to know on whom that demand was made, by whom and at what date and what place that demand was made and what capacity the person on whom it was made alleges he represented the defendant company.

Those are the motions which we made in regard to this pleading, Your Honor.

The Court: As to the first paragraph of the motion, paragraph No. I, the motion is denied. The averment of $37,412 may be unnecessary but it seems to me that from the reading of the complaint that it is not improper to state that sum if that is the plaintiffs' view of it.

As to the second and third paragraphs, they are likewise denied because all of that information has now been fully [231] developed by the examination and cross-examination of plaintiffs' witnesses and there is nothing that could be added to the information of the defendant if the requests were complied with. Moreover in the—similar motion was directed to one of the plaintiffs' pleadings in this case and names were furnished, so that in further delaying the case in requiring the plaintiffs to grant this motion there would be a denial of justice, and the information is now in, in my judgment, just as

fully within the knowledge of the defendant and its counsel as it would possibly be by any further pleading.

Mr. Davis: Now, Your Honor, I would like to renew the motion that I made yesterday—a motion for directed verdict and the motion I made this morning for a non-suit insofar as the second amended complaint is concerned, for the reason that on plaintiffs' case there is not sufficient to allow the matter to go to the jury on any claim sale made on the 24th day of March, 1948. It is apparent from the evidence we now have that there wasn't any such sale on that date or about that date.

The Court: The motion is denied—the motions are denied and exceptions will be noted as of course.

Mr. Davis: At this time, then, Your Honor, we have prepared an answer and a counter-claim to the second amended complaint. I would like to file the original and serve a copy on counsel.

The Court: Has counsel for plaintiffs read this pleading? [232]

Mr. Bell: We are just reading it, Your Honor, carefully.

The Court: You may proceed.

Mr. Bell: Your Honor, I object to the filing of the cross complaint at this time because at this particular stage of the trial because if there was such a defense they had it all the way through. That is the only reason. Everything they set forth on the cross-complaint they can make proof under the answer anyway and that would require us to take

an hour or two to plead to it to get our answer to the cross complaint and reply to the answer. It will take an hour or more to do it, and they can make any proof contented for under the answer anyway.

The Court: I think the cross complaint must stand and I do not know of any reason why we cannot proceed with the trial. Each party knows what the other party's contention is now. We can proceed and take testimony and the time will be extended to file an answer until tomorrow morning.

Mr. Bell: That will be fine; that will be all right, Judge, we can do it.

The Court: A reply to the affirmative matter contained in the answer, including the cross complaint.

Mr. Bell: All right, that will be all right.

The Court: All right, the order will be then that the plaintiffs have until 10 o'clock tomorrow morning to file a reply. [233]

Mr. Boochever: Your Honor, when we left off with the trial of the case, Mr. Jacobsen was on the stand under cross examination. That was prior to the filing of the second amended complaint and our answer in cross complaint and when we get to re-direct examination I would like to have more liberty than normal and be able to go into some matters that weren't covered on original direct examination for that reason.

The Court: Mr. Jacobsen was sworn as a witness for the defendant?

Mr. Boochever: Yes, that is right.

The Court: You may bring in new matter if you desire.

Mr. Boochever: Thank you, Your Honor.

The Court: Jury will be recalled.

Mr. Bell: Your Honor, wouldn't we be permitted to reopen our case just for a few questions as to values there that we didn't cover. In checking with the evidence, there is two or three things that I forgot to ask about the values of.

The Court: Very well, you may do so. We had better finish up with Mr. Jacobsen first.

Mr. Davis: Your Honor, I think I would like at this time to make an objection to the plaintiffs' reopening his case for that purpose and let the record show that.

The Court: The objection is overruled and an exception will be noted as of course.

Mr. Jacobsen will be recalled. [234]

The Record will show all members of the jury present.

As I recall it, plaintiff was continuing the cross examination when we left off.

Mr. Bell: No, I rested my cross examination.

The Court: Redirect examination.

E. M. JACOBSEN

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

(Testimony of E. M. Jacobsen.)

Redirect Examination

By Mr. Boochever:

Q. Mr. Jacobsen, I believe when you left the stand last night you mentioned that you had been out at Barry Arm in the spring of this year and that Mr. Hooper was at the Agostino and Socha camp, is that correct?

A. I don't quite hear you?

Q. I believe when you got through with your testimony yesterday you stated that you went out to the Barry Arm Camp sometime this spring, is that right? A. Correct.

Q. And I believe you stated that Mr. Hooper was present there, is that correct?

A. That is correct.

Q. Do you know whether he was present there by permission of Mr. Agostino?

Mr. Bell: Object to that unless he knows. [235]

The Court: That is the very question asked.

Mr. Bell: Just answer yes or no.

A. I do know.

Q. (By Mr. Boochever): Was he there by permission of Mr. Agostino?

Mr. Bell: I object to that because how would he know. First let him qualify.

The Court: Overruled.

Mr. Bell: Exception.

A. I knew there was a case either pending or coming up so I wondered why he should be on the

(Testimony of E. M. Jacobsen.)

Agostino premises where he was and I asked him point blank. That is, I asked Mr. Hooper.

Mr. Bell: Now, your Honor, it is apparent he is going to make a statement about what someone down there, an employee of the Columbia Lumber Company, told him and we object to it.

The Court: Mr. Jacobsen, you are not permitted to say what Mr. Hooper told you. That is known in law as "hearsay," for good or bad reason it is barred.

Q. (By Mr. Boochever): Was Mr. Hooper there by permission of Mr. Agostino?

Mr. Bell: I object to that.

The Court: You can answer that only from your own knowledge, not from what Mr. Hooper told you?

A. I can't answer then.

Mr. Boochever: Your Honor, I believe that plaintiffs' counsel went into Mr. Hooper being there on examination of this [236] witness on cross-examination. I think we are entitled to go into it, not to prove the truth of anything that Mr. Hooper said but just to show the words that he said explaining his presence.

The Court: That is hearsay by all the rules I know and I don't know how it can be admitted. Maybe it should be but generally speaking hearsay isn't admitted and this is no special rule. Yesterday I am quite certain no objection was made to anything in the cross-examination that brought out any

(Testimony of E. M. Jacobsen.)

answer given by this witness. Objection is now made to the testimony of the witness upon the ground that he is about to give hearsay something that Hooper told him. That is barred by the rules of evidence.

Mr. Boochever: Further, your Honor, if I may add one other point, they have alleged that Hooper was an employee of the Columbia Lumber Company, the defendant in this suit. Therefore, he is speaking, we assume that, in that regard from what he said, he is speaking for the defendant.

The Court: It doesn't change the rule of law, Mr. Boochever. The rule of law is that to have one witness repeat what another said is hearsay.

Q. (By Mr. Boochever): Mr. Jacobsen, yesterday you were shown a map allegedly drawn by Mr. Agostino, was that map at all an accurate portrayal of the Barry Arm Camp area? [237]

A. No, it was very misleading.

Q. I show you here a map and ask you if you can identify what that is?

A. This is a regular map of the Chugach National Forest.

Q. Who puts that map out?

A. Government Printing Office.

Q. Is that an accurate portrayal of the area of Prince William Sound and the Barry Arm Camp area? A. The most accurate available.

Mr. Boochever: I would like to have this marked as Identification No. E.

(Testimony of E. M. Jacobsen.)

The Court: It may be so marked. If that is an official map I can see no objection to its going in.

Mr. Bell: We have no objection.

The Court: It may be admitted in evidence and marked Defendant's Exhibit E.

Mr. Boochever: I think, rather than have it mounted, I will have the witness draw on the blackboard a portrayal, if he will.

The Court: I am sorry, Mr. Boochever, because the blackboard diagrams can never go to the upper Court. You may get a plain piece of paper.

Mr. Boochever: Possibly he could draw on the reverse side of this map and show it in enlarged scale.

The Court: If you desire that it may be done.

Mr. Boochever: First I wish to put the map as it is now on the blackboard here for a minute to have the witness identify certain areas.

Q. Mr. Jacobsen, I believe if you would come forward, please. Now, would you point out to the jury where Barry Arm is on this map?

A. Right here.

Q. Is that marked by some colored crayon there?

A. Yes, it is colored crayon. It is red pencil and ordinary pencil and ink in three different colors.

Q. Now, this is an indication of a stream running down there, what stream is that?

A. That is Mosquito Creek.

(Testimony of E. M. Jacobsen.)

Q. And where in that property was the Agostino-Socha camp located?

A. On the extreme point here.

Q. Where was the Columbia Lumber camp located?

A. About half a mile up the creek from the Barry Arm camp.

Q. And now I would like you on the reverse side to draw that in in large, covering the whole area here, just the part of the Barry Arm camp there so that the witnesses can see that clearly and show the relation of the Agostino-Socha camp and the Columbia Lumber Camp, if you will, sir?

A. The map will not be very correct because I cannot sketch [239] like that, but I will do my best.

The Court: Make the lines as heavy as you can so that the jury can see.

Q. (By Mr. Boochever): Now, can you label where Mosquito Creek is on that map? Now, if you will stand back a little from the map. Would you show the jury where the Barry Arm camp of Mr. Agostino and Mr. Socha was located in regard to this map?

A. It is located directly on their fir sale in this area here.

Q. And where is the Columbia Lumber Company camp located in that area?

A. This represents one-half a mile up on the opposite side of the creek.

Q. And that is on the opposite side of the creek

(Testimony of E. M. Jacobsen.)

and up above, is that right? A. Correct.

Q. Now, there was testimony about a pond, where is that pond located on the map—pond where Agostino and Socha used to boom their logs?

A. At that indentation in the creek. There is still——.

Q. Where did the Columbia Lumber Company boom its logs and make its rafts?

A. Up to the sawmill here. They took this part here and run up the creek necessarily for two or three hundred feet, I guess. I don't know how far it is. [240]

Q. On the far side of the creek?

A. They take the creek proper.

Q. Right in there? A. Yes.

Q. Was it possible for the two outfits to use the mouth of this creek here in logging operations?

A. It was providing the Columbia Lumber Company went up-creek a little further.

Q. And there was nothing to prevent them from doing that so that the two outfits could use that creek at the same time? A. No, that is right.

Q. Now you say this represents Bruno's first sale. What do you mean by that, sir? I think you can resume your witness chair there, if you wish.

A. By a sale I mean a purchase of a tract of timber.

Q. And this was the first tract of timber purchased, is that right? A. Yes.

Q. Who purchased that tract of timber?

(Testimony of E. M. Jacobsen.)

A. M. A. Jacobs from Anchorage.

Q. M. A. Jacobs, is that right? A. Yes.

Q. Did Mr. Agostino acquire it from Jacobs?

A. No, they were partners but it was in his name.

Q. Had there been other timber which had previously been cut [241] off in that area prior to that purchase?

A. There had been up to the point that we have the remaining blank space.

Q. Down in this neighborhood here?

A. Yes.

Q. That had been cut off before Agostino got in there at all? A. Many years ago.

Q. Someone else had cut timber in that area then? A. Yes.

Q. What *is* this area in here represent?

A. That is the second sale issued to Barry Arm which is the same partnership.

Q. When about was that issued, Mr. Jacobsen?

A. 1945, mid-summer, I believe.

Q. And when did that expire—that permit to cut timber?

Mr. Bell: I object to that, assuming something that is not in evidence, when did it expire. That is assuming something that is not in evidence. Leading and suggestive.

The Court: Overruled.

Q. (By Mr. Boochever): When did that permit expire if it did expire?

(Testimony of E. M. Jacobsen.)

A. It originally expired in 1947—December 31st, 1947 and was extended to 1948.

Q. When was it extended? On what date approximately? [242] A. Mid-summer of 1948.

Q. In the mid-summer of 1948? A. Yes.

Q. Around the month of July, sir?

A. I believe so.

Q. And was it extended to Mr. Agostino and Mr. Socha at that time? A. Yes.

Q. It was not extended to Columbia Lumber Company, was it? A. No.

Q. It was extended to them in mid-July of 1948, then? A. Yes.

Q. Now, did they ever cut off all of the timber in that second area?

A. I am unable to answer that because we have not made final inspection of the area.

Q. You have not made a final inspection to check on that recently? A. No.

Q. Now, where was the timber permit that Columbia Lumber Company had, what area did that cover on this map?

A. That covered all the timber in the valley from the Agostino line on up the creek on both sides.

Q. Was there a gap in the merchantable timber between the end of the Agostino line and the commencement of the Columbia [243] Lumber line?

A. There was about a quarter of a mile, as I recall it.

(Testimony of E. M. Jacobsen.)

Q. A quarter of a mile in here where there was no merchantable timber at all and it was about that where the Columbia Lumber started? A. Yes.

Q. Can you draw in on this map the area covered by the Columbia Lumber permit?

A. I haven't room for that extension.

Q. As much as can be shown on the map?

A. We will have to assume this to be grassy land and no timber.

Q. Could you speak up on that a little louder, Mr. Jacobsen so that the Judge and the jury can hear you? A. I will.

Q. What did you say about this part?

A. This is grass—no timber. This is the timber. Timber is quite patchy there and it is not continuous. It is just patches there and there as you go along. This part here represents grassy land. It is barren from timber. It is the bottom of the valley and each side on the rising hillside is the timber purchased by the Columbia Lumber Company and the timber is not a solid body of timber. It is in, oh, a quarter of a mile, half mile patches, all along up the valley for about two and one-half or three miles, as I recall it. [244]

Mr. Boochever: I think some members of the jury wish to see the other side of the map and if your Honor permits I will take the map down and let them see it at close range.

The Court: Counsel may proceed.

Mr. Boochever: Your Honor, I wish to introduce

(Testimony of E. M. Jacobsen.)

this sketch drawn by the witness into evidence as Defendant's Exhibit F—the reverse side of the map.

The Court: Without objection it will be admitted and marked Defendant's Exhibit F.

Mr. Bell: No objection.

The Court: It is the reverse side of Defendant's Exhibit E.

Q. (By Mr. Boochever): Mr. Jacobsen, now you have been up in that area a number of times, is that correct? A. I have.

Q. To your knowledge has Columbia Lumber Company ever cut any of the timber that was in Bruno's permit?

A. No, I don't know that they have.

Q. Now, Mr. Jaco*g*sen, have you had occasion to see the equipment which the Barry Arm camp of Agostino and Socha, and whoever their other partners were, had there at Barry Arm?

A. Yes.

Q. Do you know in what condition the caterpillar tractors were [245] in the year 1948 or in the end of 1947?

A. I wouldn't be in a qualified position to state one way or the other as to the condition of machinery. I don't know.

Q. Do you know whether any of the caterpillars had ever been in the salt water?

A. Yes, the cat purchased from Elemar Packing Company was submerged once for a week or so.

Q. And it was in salt water for a week or so?

(Testimony of E. M. Jacobsen.)

A. I guess that is right.

Q. When was that approximately, do you know what year?

A. I believe it was 1946, it could be 1945, I don't recall.

Q. Well, it was submerged in salt water for more than a week, is that right? A. Yes.

Q. Now, testimony has been given in regard to the pond there and it has been testified that part of the pond was cleared of stumps by Mr. Agostino and Mr. Socha, did they clear the part where Columbia Lumber Company used their log rafts, to your knowledge?

A. Yes. I don't know. I don't think there were any stumps out in the creek proper. There were debris and what have you in the still water alongside of the creek.

Q. Is that alongside of where the Agostino-Socha camp was, you mean?

A. Yes, that was adjacent to their cutting area.

Q. Did Columbia Lumber Company use that for their timber area in making their log rafts?

A. No, I don't believe they ever did.

Mr. Boochever: No further questions, your Honor.

The Court: Any further cross-examination?

Recross-Examination

By Mr. Bell:

Q. Mr. Jacobsen, you stated this cat was sub-

(Testimony of E. M. Jacobsen.)

merged in 1946 in salt water, where did that take place?

A. In the very still water where it operated their boom or where they rafted their logs.

Q. Did you see that yourself?

A. Oh, yes, definitely.

Q. Were you there at the time it happened?

A. How else could I see it?

Q. I mean when it first went down were you there? A. No.

Q. Do you know how long it stayed there?

A. I was told—that is hearsay.

Q. Don't tell me how long but what—just tell me what you know about it, how long did you see it?

A. I saw it sitting in the mud.

Q. When? A. (No response.)

Q. When, Mr. Jacobsen? [247]

A. You mean year or state——

Q. About what time?

A. It was either '45 or '46, I don't remember exactly.

Q. And what time of the year?

A. Sometime during the summer time.

Q. Well, was it in the spring or fall or hot summer time? A. I wouldn't venture.

Q. You saw it in operation by the plaintiffs in this case, didn't you? A. I did.

Q. And was that after you saw it in the mud or was it before you saw it in the mud?

(Testimony of E. M. Jacobsen.)

A. I saw it in operation by the plaintiffs both before and after it was in the mud.

Q. You saw it in operation for three or four years after it was in the mud, did you, up until 1948?

A. No, the plaintiff did not operate out there during the year 1948 to my knowledge.

Q. Well, you saw the defendants operate it, didn't you? A. No, I did not.

Q. You did see it at their place, I believe you testified yesterday, you saw it?

A. No, I couldn't have because I did not see it.

Q. Oh, I, I see, I misunderstood. You did see it there in 1948 somewhere? [248]

A. No, I don't believe I did. I only made one visit there in 1948 and I don't recall seeing the cat.

Q. What time of the year was it that you visited the mouth of Mosquito Creek in 1948?

A. That was in July, I believe.

Q. Do you know who was in charge of things there at that time? A. Yes, Mr. Lambert.

Q. Mr. Lambert who testified here before?

A. Yes.

Q. Now, did you receive the checks and sign the permits for the Columbia Lumber Company for the timber sales in there?

A. No, that was handled by the regional office in Juneau.

(Testimony of E. M. Jacobsen.)

Q. Do you know what dates those permits were issued or timber sales were issued?

A. They were issued very early in the spring before I returned from Seattle, I will say March or February of 1948.

Q. That was in 1948? A. Yes.

Q. Could you be mistaken and that they were issued on the 12th day of April, 1948?

A. Yes, I could be.

Q. Didn't you ever see them, Mr. Jacobsen?

A. Yes, but I don't remember the dates.

Q. Now, were they all in one sale or were they in a number of sales? [249]

A. They were in two separate sales, the first one was issued for the east side of Mosquito Flat and the second one was issued for the second side.

Q. Is Mosquito Creek straight or is it a crooked stream? A. A very crooked stream.

Q. I see that you have drawn on this map Mosquito Creek to be quite straight?

A. That is very true, because I couldn't put crooks in. They were just major crooks, I didn't know where the crooks went.

Q. As I understand it, this creek is very crooked back and forth across the grassy valley, is it not? A. It is.

Q. And about how wide is it up in here?

A. Are you pointing?

Q. About even with the Columbia Lumber Company camp?

(Testimony of E. M. Jacobsen.)

A. It is about 40 to 60-feet wide up there.

Q. Is it in high tide? Do you mean it is that wide in high tide? A. That is the creek bed.

Q. Now, then, in low tide it is dried up there or almost?

A. It is dry. It is barren from salt water. Salt water does not back up except it is high tide.

Q. So there is a little stream of water running down through all the time, is it? [250]

A. That is right.

Q. About how wide is the little stream of water that runs by the Columbia Lumber Company camp there when the tide is out?

A. I would venture a guess with the ordinary, not with the heavy freshlet or anything like that but the ordinary, running of the stream I would say about six inches deep by ten feet wide.

Q. Ten feet wide and about six inches deep?

A. Yes.

Q. That is clear water, that is not salt water?

A. That is fresh water.

Q. How far down would you say the stream would be approximately that size in low tide, how far down below the Columbia camp would that go?

A. Not very far. It runs down that way for perhaps two or three hundred feet and then she is deeper and wider.

Q. It gets deeper and wider gradually, does it?

A. I believe the salt water is backed in there most of the time.

(Testimony of E. M. Jacobsen.)

Q. Now, then, you can't get up to the Columbia Lumber Company with your boat, their camp now?

A. No.

Q. You take a skiff to go up?

A. That is right.

Q. Now, you can come in near the shore here down in here, [251] can't you?

A. At Barry Arm camp.

Q. Can you come right up to that when high tide is on, can you come right up into there?

A. No.

Q. How far up can you go?

A. I anchor here.

Q. You anchor here and then you use a small boat to go in? A. Yes.

Q. How many sales did you make to Barry Arm crowd at this Mosquito Creek? A. Two.

Q. I believe you stated that—I think I shoed you this yesterday, did I not, Mr. Jacobsen?

A. A modification of the timber sale agreement. That is an extension of the timber sale agreement.

Q. Now, I notice by that it extended all the rights to remove the timber up to 12-31-48, did it not? A. It did.

Q. Now, at the time that was granted, the Columbia Lumber Company was operating there and taking timber, weren't they?

A. Yes, of course.

Q. Do you remember where you were at the

(Testimony of E. M. Jacobsen.)

time Mr. Bruno Agostino signed that statement, do you remember where he signed it?

A. Yes, definitely. [252]

Q. Where was he? A. At Whittier.

Q. At the Columbia Lumber Company place at Whittier? A. Yes.

Q. Now, did you prepare that for him to sign?

A. Yes.

Q. And did you write it yourself or someone there write it? Did you dictate and have someone write it?

A. No, I had it written up months and months before in the home office and I was trying to corral Bruno by mail or any manner I could from the time I arrived in the first of April.

Q. Then at the time he signed this, which was the 10th day of July, 1948, Columbia Lumber Company had already cut many thousands of feet of timber there, hadn't they? A. Yes.

Q. Now, you heared—I will withdraw that—How did you come to have it prepared a long time before, Mr. Jacobsen, before you presented it to Bruno that day?

A. Because I was unable to contact him by mail or otherwise and this was my first opportunity.

Q. And did he tell you on that date that he had sold out to the Columbia Lumber Company?

A. No, he did mention—can I testify as to hearsay?

(Testimony of E. M. Jacobsen.)

Q. Tell as to what Bruno Agostino told you, because he is a party to the lawsuit. [253]

Mr. Boochever: Not unless Columbia Lumber was there. That is hearsay to the same extent this other was hearsay.

Mr. Bell: I will withdraw it then. I think maybe he is right about it.

Q. You did prepare it about the first of January of 1948, didn't you, wasn't that about when it was prepared?

A. No, it was later than that because I spent a winter in Seattle and I did not return to Cordova until I believe it was the 5th of April, 1948 and I took it up then. It should have been prepared long before but it wasn't.

Q. Had arrangements been made for the extension before that?

A. No, this is the only arrangement that has been made.

Q. In other words, Mr. Jacobsen, what I would like to know, how did you know that you were supposed to grant him the extension?

A. Well, I knew that he needed an extension because he was not finished with the area.

Q. That is right, and there is quite an area of timber uncut yet? A. Yes, that is right.

Q. Now, then, you had received check paying for $250 for 250,000 feet, had you not?

A. Yes, in a way. We don't collect checks, they go direct to our fiscal agent at Juneau and we are

(Testimony of E. M. Jacobsen.)

notified that the payment we called for has been received down there. [254]

Q. Did you ever see it personally—see that check personally? A. No.

Q. I believe it is stamped with the Juneau——

A. Yes, that is right. No, we don't see those checks ever. It goes directly to the fiscal agent.

Q. Well, these stamps on here indicate that the date that it was paid and so on, doesn't it, on the back? A. Yes.

Q. What do you charge for stumpage—lumber on the stump? A. $1 a thousand.

Q. $250 check would be for how much lumber?

A. One quarter of a million feet.

Q. Or 250,000 feet, wouldn't it? A. Yes.

Q. At the first of the year—at the close of the cutting season of 1947, did you get into the mouth of Mosquito Creek or at the Barry Arm camp?

A. Well, I will have to refresh my memory on visit made there. I have it in my pocket, shall I?

Q. Sure, sure, if you have the information there, you see.

The Court: I think we had better take a recess until 3:30.

(Short recess.)

The Court: The record will show all members of the jury are present. Counsel may proceed with the examination. [255]

Q. (By Mr. Bell): Mr. Jacobsen, since refresh-

(Testimony of E. M. Jacobsen.)

ing your memory by your book, would you tell the jury the last date that you visited Barry Arm camp in 1947? A. August 7, 1947.

Q. And what were your dates of visit in 1948?

A. July 21st.

Q. July 21st, 1948? A. Yes, sir.

Q. Now, then, do you know whether or not Bruno Agostino had some unfinished cuttings on his permit before he paid the $250 for an additional 250,000 feet.

Mr. Boochever: I object to that question as including two questions in one. It assumes that he did secure additional permit there which I understand is incorrect and he has to answer that part and then answer the other part.

Mr. Bell: I will separate it. I did show you the check where he purchased the additional 250,000 board feet.

Mr. Boochever: I object to that; the check doesn't show he purchased any additional 250,000 board feet.

The Court: Well, the jury knows what the testimony is. Overruled, you may answer and if the question is misleading say so.

The witness: The sale that was made—the last sale that was made was in the amount of $500 of which $250 were paid in [256] advance. As the cuttings progressed up to that amount, $250, we called for an additional $250 on the same sale.

Q. And it was all on the same sale?

(Testimony of E. M. Jacobsen.)

A. Yes.

Q. And it was the last half of the 500,000 board feet of cutting? A. Yes, that is correct.

Q. Now, then, in the fall of the year, 1947 about how many hundred thousand feet, board measure, did the Barry Arm camp crowd have a right to cut yet? A. 250.

Q. Well, was it just 250,000 or was there a little bit left of the first 250,000?

A. Well, that is an estimate and I cannot be too positive. Final scale determines the actual payments and we do have to estimate the timber involved which could vary. We will say there was a quarter of a million or there is a half million and it would vary ten or fifteen or twenty percent either way.

Q. But he did have fully 250,000 feet, board measure, yet to cut there?

A. We expected that, yes, sir.

Further Redirect Examination

By Mr. Boochever:

Q. Now, this in July 12th of 1948, there was a modification and extension of timber agreement grant to Mr. Agostino, is [257] that correct?

A. Yes, sir.

Q. By extension does that mean increasing the size or extension of the——

A. Extension of time for the same area.

Q. In other words, this is the same area that he had been previously granted, is that right?

A. Yes, sir.

(Testimony of E. M. Jacobsen.)

Q. Now, at that time you went out there and saw Mr. Agostino, I believe you testified, is that correct?

A. No, I saw Mr. Agostino in Whittier, that is when the modification was made out.

Q. That is what I meant, sir? A. Yes.

Q. When was that?

A. Well, it was right around July 21st—July 21st I apparently was at Barry Arm. I did not see Mr. Agostino at Barry Arm but I saw him a day before or day after at Whittier.

Q. And you gave him an extension of his right to cut that timber? A. That is right.

Q. Did he say to you to the effect that it should be given to Columbia Lumber, that he had sold his lumber or anything to that effect?

A. No, he did not. I think, however, he did say that he might [258] sell through Columbia Lumber and be clear or some such statement.

Q. And that was on July 21, 1948 or thereabouts?

A. Yes.

Q. Now, you were asked if Columbia Lumber cut timber and the word used was "there" and you answered yes, but that did you mean they cut in ther*e* own timber grant?

Mr. Bell: I object to leading his witness; the witness is very intelligent.

The Court: Overruled.

Mr. Bell: Exception.

A. Yes, they cut in their own restricted area.

Q. (By Mr. Boochever): Did you mean by that

(Testimony of E. M. Jacobsen.)

they cut in Agostino——

A. No, I mean in their own restricted area up the creek.

Q. Thank you.

Mr. Boochever: That is all, Your Honor.

The Court: Any further cross-examination?

Further Recross-Examination

By Mr. Bell:

Q. In Whittier at the time that you prepared that paper to Mr. Agostino to sign, did he tell you this or this in substance "My timber has already been cut off by the Columbia Lumber Company—Mr. Morgan" and did you say to him "Well, he had no right to do it; you ought to have him arrested"?

A. No.

Q. Now, you didn't say that to Bruno Agostino?

A. I did not.

Q. And weren't you and Tom Morgan together there—I don't know whether it was Tom Morgan—A Mr. Morgan, when you were talking to Bruno Agostino?

A. No, we were alone sitting out on a lumber pile near the salt water edge.

Q. Of the Columbia Lumber Company camp?

A. While I was trying to induce him to sign. I say "induce him" because I had quite a time persuading him that he had no right there at all unless he signed the agreement and he did make a statement saying "I will sign it for you and for nobody else" and I felt quite flattered about that.

(Testimony of E. M. Jacobsen.)

Q. Why was it, could you understand why he said he didn't want to sign an extension of it?

A. No, I couldn't quite understand that.

Q. Could it be that you forgot that he told you that he had sold it to the Columbia Lumber Company and they had already cut the timber?

A. No, definitely not.

Q. The permit, you feel, was for his benefit or for whose benefit?

A. It was for his benefit. He had no right. He was a trespasser there after January 1st, to be very proper, in the eyes [260] of the Forest Service.

Q. And he had paid, however, the $250 but the permits had not been given to him or something of that kind?

A. Well, he had used up his period of cutting. He had failed in his contract.

Q. He had to have it renewed for permission to cut there, is that right? A. That is right.

Q. And you knew at the time that his lumber was cut, that all the lumber near the mouth of Mosquito Creek and over the ground that he had any right to cut on that already had been cut at that time? A. No, I did not know that.

Q. I thought you said that you had been to Barry Arm camp and that the lumber had all been cut out except some scattering timber there?

A. No, you greatly are mistaken; I did not say that.

Q. Did you say you went to Barry Arm camp in July 21st? A. Certainly.

(Testimony of E. M. Jacobsen.)

Q. And you came back from there to Whittier, did you? A. Correct.

Q. And that is when you had Bruno sign this?

A. Yes.

Q. Did you sign it at that same time?

A. I signed it at the same time, yes. [261]

Q. You dated it, of course, at the time you signed it? A. Did what?

Q. You dated it at the time you signed it, didn't you? A. Yes.

Q. I will ask you to look at the date on that and tell the jury what that date shows?

A. It shows no date at all.

Q. Can you see that, Mr.——?

A. 10th day of July.

Q. Now, that was dated on the 10th day of July not the 21st at all, wasn't it?

A. Well, I can retrace that very simply. I have said it was a day after or ten days. It might have been ten days after.

Q. You can't remember whether it was one day or ten? A. (No response.)

Q. Then you couldn't hardly remember what Mr. Agostino told you then if you couldn't remember any better date than that, could you?

A. I don't value that an answer.

Q. You couldn't remember any better one thing than you could the other that happened that day, can you? A. Possibly I can.

Q. You are a pretty good friend of Mr. Morgan, aren't you?

(Testimony of E. M. Jacobsen.)

A. I am friends of everybody who wishes to be friends with me. [262]

Q. You have been staying over at the hotel with Mr. Morgan since you have been in town, haven't you?

A. I have seen very little of Mr. Morgan except around the court room.

Q. You were in Mr. Morgan's room when Mr. Ross called you on the 'phone, weren't you?

A. Certainly.

Mr. Bell: That is all.

Further Redirect Examination

By Mr. Boochever:

Q. Mr. Jacobsen, has any attempt been made to intimidate you in regard to this trial?

Mr. Bell: I object to that because that would not be proper, an attempt to intimidate. That is the only question——. He has been on the stand here. He is a man of ability. We object to that.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Have you been in Mr. Bailey's office? A. Yes.

Q. Mr. Bell's? A. Yes.

Q. Did he talk to you at length about this case?

A. We discussed it very little, in fact, I was astonished how well they confided in me. [263]

Q. Did they attempt to get you to testify on this case?

(Testimony of E. M. Jacobsen.)

A. Well, they summoned me here for the purpose of testifying.

Q. And were you willing to appear after you were summoned for them?

A. No, I was not willing to appear.

Q. And why not? A. Because——

Mr. Bell: I object to why; that is a conclusion.

The Court: Overruled.

Mr. Bell: Exception.

A. Because I felt I could do them no good.

Q. (By Mr. Boochever): And have you told the truth on this stand all through your testimony?

A. Every word of it.

Q. And what you remembered you have told and when you didn't remember something you told that, is that right? A. That is right.

Mr. Boochever: That is all, Your Honor.

Further Recross-Examination

By Mr. Bell:

Q. Would you please tell the jury where my office is? A. In the Central Building.

Q. And what room is it? A. 216, I guess.

Q. 216, and that is the room you visited me in, is it? [264]

A. Well, I don't know, let's say that way.

Q. Now, you talked to Mr. Ross just before noon today, didn't you? A. Yes, sir.

Q. And in that conversation did you say this to Mr. Ross or this in substance "Morgan is a

(Testimony of E. M. Jacobsen.)

slicker and trying to beat these men"? Did you say that to Mr. Ross in his office?

A. No, sir, I did not.

Q. Did you say anything about Mr. Morgan to Mr. Ross in his office?

A. I don't think he was mentioned. We were settling the bill.

Q. And did you say anything to Mr. Ross about Mr. Morgan at all?

A. I can't remember, I don't believe I did.

Q. Was the word "slicker" mentioned by you.

A. No.

Mr. Bell: That is all.

Mr. Boochever: That is all.

The Court: That is all.

(Witness excused.)

The Court: Is there any reason to detain Mr. Jacobsen here?

Mr. Boochever: We have none.

Mr. Bell: Not on our part.

The Court: You may be excused permanently. Another witness may be called.

J. F. HOOPER

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, sir?

(Testimony of J. F. Hooper.)

A. J. F. Hooper.

Q. Where are you employed now, Mr. Hooper?

A. Columbia Lumber at Barry Arm.

Q. Where are you employed during the fall of 1948? A. Barry Arm.

Q. What was your occupation during 1948?

A. Boom man.

Q. And when did you first come out to Barry Arm? A. Around the first of August.

Q. And did you have your wife with you at that time? A. Yes, I did.

Q. And where did you and your wife live then?

A. We occupied one of the camp buildings at Barry Arm—Bruno's camp.

Q. Bruno's camp, is that right?

A. That is right.

Q. And that was what time you moved in there?

A. Around the first of August as near as I can remember. [266]

Q. And how long about did you stay living on that property?

A. Well, I actually stayed there until the camps were down in the fall.

Q. Now, did you receive any orders at any time from Columbia Lumber to leave that property?

Mr. Bell: Now, I object to that; that is hearsay, purely hearsay.

The Court: Overruled.

Mr. Bell: Exception.

(Testimony of J. F. Hooper.)

Q. (By Mr. Boochever): Would you answer the question, please? A. Yes, I did.

Q. About when was it that you received such order? A. It was the latter part of August.

Q. After you received those instructions did you see the plaintiff here, Mr. Agostino?

A. Yes, I did.

Q. Where was he at the time?

A. He was there at camp.

Q. Was he staying there?

A. He was staying in his cabin, yes.

Q. And did you have any conversation with him in regard to your being at the camp? A. Yes.

Q. What was that conversation? [267]

A. I told Mr. Bruno that I had been notified by the company that I would have to leave the building and I and my wife talked with Mr. Bruno and asked him if we could continue to occupy one of the buildings there.

Q. What did he say?

A. Yes said, yes we could.

Q. Did he ask you to do anything in regard to the buildings

A. Well, he said that if somebody don't stay here the buildings will fall down during the snow and he said "I would be glad to have somebody stay here to look after my cabin" and "I have stuff in it that I don't want to lose there."

Q. And did you stay on? A. I did.

(Testimony of J. F. Hooper.)

Q. Now, during the spring did you see Mr. Jacobsen this year? A. Yes.

Q. And did you tell him why you were staying there at that time? A. Yes.

Q. Now, prior to that time you spoke about seeing Mr. Agostino, had you seen Mr. Agostino there before that in the month of August, 1948?

A. Well, Mr. Agostino was there at the time I got notice that I would have to vacate the house. He was in his cabin then.

Q. And before that day had you seen Mr. Agostino? A. Yes. [268]

Q. Had you talked with him? A. Yes.

Q. And what did you tell him about why you were there then?

A. Well, I told him that I was there because there were no other living quarters available and having my wife with me I must either stay in his camp or I would have no place for her to stay.

Q. And that was before you received quarters —before you received orders to leave the camp, is that right? A. That is right.

Q. Now, after this second conversation with Mr. Agostino did he leave shortly after that?

A. Yes, he did.

Q. And did you stay on? A. Yes.

Q. Do you know whether anyone came and took one of the caterpillar tractors away after that?

Mr. Bell: After when?

(Testimony of J. F. Hooper.)

Mr. Boochever: After Mr. Agostino left.

Mr. Bell: I object to it unless it was in the presence of Agostino or Mr. Agostino took it. What they did with the cat——

The Court: Overruled.

Q. (By Mr. Boochever): Would you answer the question, please? [269]

A. Well, I don't quite understand the question.

Q. The question was whether anyone ever came and took any of the cats away?

A. Yes, there was somebody took cats away but not while I was home.

Q. Not while you were home?

A. It was while I was at work.

Q. And did you see someone take a cat away?

A. Well, I saw the boat come in and I saw it go away and the cat was gone when I came home.

Q. About when was that?

A. I didn't keep no account of the date or anything but I should judge it must have been in September as near as I can remember.

Q. And was that Columbia Lumber or any of its men who came and took that cat away?

Mr. Bell: I object to that because he said he didn't know who took it away already.

The Court: Objection sustained.

Q. (By Mr. Boochever): Your Honor, he could not know but he could know whether it was a Columbia Lumber man or a Columbia Lumber boat.

(Testimony of J. F. Hooper.)

The Court: I don't see how he saw the man come in and go out.

Q. (By Mr. Boochever): Do you know if that boat belonged to Columbia Lumber Company?

A. I know it didn't.

Q. Where were the cats at the time this one cat was taken?

A. They were both at Bruno's camp.

Q. Were they in his garage? A. Yes.

Q. Do you know whether the other cat was ever taken away? A. They were both taken.

Q. Do you know whether either of them were taken by Columbia Lumber Company or any of its men?

Mr. Bell: I object to that for the same reason. He states he doesn't know.

The Court: The objection is good as to the first one but not as to the second.

Q. (By Mr. Boochever): With regard to the second one, do you know whether it was taken by a Columbia Lumber man or any of its employees?

A. It was not.

Q. Now the rest of Agostino's equipment there, was that left back in his cabin in his garage and cabin after you received orders to leave the premises?

Mr. Bell: I object to it as leading and suggestive.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Now, do you know

(Testimony of J. F. Hooper.)

whether any of the other Columbia Lumber men occupied those premises after September 1st?

A. No, they did not.

Q. Did they use any of Agostino's property after that date?

Mr. Bell: I object to that for the reason that there is no contention that Agostino has any property there.

The Court: The objection is sustained.

Q. (By Mr. Boochever): Did they use any of the property which was known as Agostino and Socha's property, which is under dispute in this case as alleged to have been sold to the Columbia Lumber Company?

Mr. Bell: I object to that as calling for a conclusion of the witness and for the further reason it is leading and suggestive and there is no contention that Agostino and Socha had any property there.

The Court: Overruled. He may answer.

Q. (By Mr. Boochever): Would you answer the question?

The Court: I don't know what date?

Mr. Boochever: It was after he received orders on or about the end of August, early in September, from September 1st on.

The Court: You can tell what you know about the property and whether any of it was left and if so who took it.

A. Well, the property—the cats and a certain

(Testimony of J. F. Hooper.)

amount of [272] equipment—which, of course, I am not familiar with—what was there when I came, because the company had taken away the cats and was working on them at the time I came.

Q. (By Mr. Boochever): By that you mean they were repairing them?

Mr. Bell: I object to leading the witness.

The Court: Yes, your side complained quite often about the leading questions and evidently they are adopting the same theory.

Mr. Boochever: Very well, Your Honor.

Q. What do you mean by "working on them"?

A. Well, they had mechanics to repair the cats. They were intending to use them for logging purposes and they had taken them over to their shop there where they could work on them before I came so I don't know what was there before I came.

Q. Then after you came and after you received the order to leave the property what was done about the equipment?

A. Well, the equipment was returned back to Agostino's camp.

Mr. Boochever: That is all, Your Honor.

Cross-Examination

By Mr. Bell:

Q. Now, that was what date was it that you saw Agostino down there?

A. I can't give a definite date but as near as I can remember it was the latter part of August.

Q. How did he come? [273]

(Testimony of J. F. Hooper.)

A. He came in a 'plane.

Q. And how long did he stay?

A. As near as I can remember a week or ten days.

Q. A week or ten days?

A. He was there several days.

Q. And where did he stay?

A. He stayed in his cabin.

Q. In a little cabin off to itself, is it?

A. Yes.

Q. Off to one side? A. That is right.

Q. And that is the only time you ever saw Bruno Agostino, is it? A. Oh, no.

Q. I hand you Plaintiffs' Identification 32 and ask you to state if you have ever seen that before?

A. Yes.

Q. Who wrote that, if you know?

A. Well, I don't know who wrote it,—Yes, I wrote that.

Q. You wrote that yourself? A. Yes.

Mr. Bell: We now offer this in evidence.

Mr. Boochever: No objection.

The Court: It may be admitted as Plaintiffs' Exhibit No. 32. It may be read to the jury. [274]

Mr. Bell: "Mr. and Mrs. J. F. Hooper occupying this house by permission of the Columbia Lumber Company, August 30, 1948. Witness."

You may see it if you care to.

Q. When did you first start occupying that house?

(Testimony of J. F. Hooper.)

A. Well, I don't remember the exact date, but it was near somewheres around in the first part of the month of August.

Q. When did you first go to work for the Columbia Lumber Company?

A. I have been employed by them for two years.

Q. When did you first go to Barry Arm camp?

A. Around the first of August as near as I remember.

Q. Where were you immediately prior to going there? A. Whittier.

Q. What were you doing at Whittier?

A. I was boom man at Whittier at the mill.

Q. And when you quit at Whittier you went directly to Barry Arm camp, did you?

A. I didn't quit at Whittier.

Q. You were transferred? You finished working there and went to Barry Arm camp, didn't you?

A. That is right.

Q. How long did you stay at Barry Arm camp?

A. I have been there ever since.

Q. And you are still there? [275]

A. Where?

Q. At Barry Arm camp?

A. That is right.

Q. Where are you living now?

A. I am living in the same place at the present time that I was when I came there.

Q. That is what is called the Barry Arm camp house that you referred to as Agostino's house?

(Testimony of J. F. Hooper.)

A. That is right.

Q. Now, how many times did you see Agostino in August of 1948?

A. Well, I saw him several times because he was there for several days.

Q. Did you ever talk to him any more than once?

A. Oh, yes.

Q. Was he in your house at the time you wrote that paper? A. That is right.

Q. And you are still there now?

A. Yes, sir.

Q. In what capacity are you staying there now?

A. Only permission of Mr. Bruno.

Q. What are you doing there in the valley at Barry Arm camp?

A. I work over at the Columbia Lumber.

Q. You work for the Columbia Lumber Company yet? A. Yes. [276]

Q. And in what capacity do you work?

A. As boom man.

Q. Are you cutting timber there now?

A. No, I don't cut no timber.

Q. Are the Columbia Lumber Company people cutting timber there now? A. I presume so.

Q. Were they there cutting timber when you left there? A. That is right.

Q. What day did you leave there?

A. Monday, I guess it was.

Q. Monday of this week? A. Yes.

Q. And how far up Mosquito Creek are they

(Testimony of J. F. Hooper.)

cutting now?

A. I don't know, I haven't been up there.

Q. I believe you stated that you got notice from the Columbia Lumber Company to move out of that house? A. I did.

Q. Was that in writing or oral?

A. That was through the foreman of the camp.

Q. Through the what?

A. Through the foreman of the Columbia Lumber camp.

Q. And he told you that? A. Yes.

Q. Did he give you anything in writing? [277]

A. No.

Q. And you didn't move out?

A. Well, I prepared to move out.

Q. And you are still living there now?

A. But at that time Mr. Bruno was there so I and my wife talked to him and made arrangements to stay there.

Q. Was that before you gave him this paper?

A. No, that was given the paper before that—before I got the notice of the return from the company.

Q. Did you get anything in writing to show that?

A. I did not. They never give me anything in writing.

Q. I mean, did Mr. Agostino give you anything in writing? A. No.

Q. And he asked you to give him something in

writing but you didn't ask him for anything back, is that right? A. No, that is right.

Mr. Bell: That is all.

The Court: That is all, sir.

Mr. Davis: Just one minute.

Mr. Boochever: That is all, Your Honor.

The Court: Jurors have the right to ask questions. I forgot to remind them before. If you want to ask questions at any time just so indicate.

(Witness excused.)

EDWARD F. McALLISTER

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, sir?

A. Edward F. McAllister.

Q. Where were you in the spring of 1948?

A. I came to Barry Arm camp on the 15th of April.

Q. How did you happen to come there?

A. I hired out to Blacky Lambert of Seattle.

Q. And did Mr. Lambert hire you?

A. That is right.

Q. In what capacity were you hired?

A. I went up to do the climbing and the hooking.

Q. Where did you go at that time—where did you go to work for Mr. Lambert?

(Testimony of Edward F. McAllister.)

A. I went to work at the camp at Barry Arm.

Q. Are you familiar with the camp of Mr. Agostino that is claimed by Mr. Agostino and Mr. Socha?

A. I know where Bruno's camp is, yes.

Q. Did you live there or not?

A. No, we lived in the Barry Arm camp.

Q. Whose camp was that, was that Lambert's camp?

A. I suppose it was Lambert's camp. That is the man I was working for. [279]

Q. Where was that located in relation to Bruno Agostino's camp?

A. That would be about, I guess, in the neighborhood of 1500 or 2,000 feet from Bruno's camp up the creek.

Q. And at the time you arrived when was that?

A. I went to work on the 17th of April.

Q. And at that time how many men were working there?

A. There was—I believe there was eight men working when I arrived there.

Q. Whose employees were those men?

A. Well, as I understand it, Mr. Lambert's.

Q. Were there any, to your knowledge, Columbia Lumber employees there?

A. Not that I know of. I understood everybody was working for Blacky Lambert.

Q. Now, at that time were you using any of Mr. Agostino's equipment or his property?

A. Not that I know of.

(Testimony of Edward F. McAllister.)

Q. Was Mr. Agostino around the camp at that time?

A. Well, he was there shortly after I was there, I know that, he was there for three or four weeks.

Q. And where was he living at the time?

A. He lived in his own camp.

Q. Now, what was your job there?

A. Well, I was hooking and climbing. [280]

Q. Is that connected with cutting timber?

A. No, that is rigging up and yarding.

Q. And are you familiar with the timber that was cut there by Columbia Lumber Company?

A. I know the timber that was cut, yes.

Q. Where did they start cutting with regard to the timber Bruno Agostino had cut off previously?

A. Bruno's last setting—I believe Lambert's first setting would be a thousand or fifteen hundred feet upstream from where Bruno had logged. I am not positive exactly but it would be in that neighborhood.

Q. Approximately how many feet of timber were between where Lambert started logging and Agostino stopped logging, if you can estimate?

A. I wouldn't estimate that. There is scattered patches in there. As far as being commercial timber, I don't know, there is quite a patch in there.

Q. So far as you know did Lambert log any of Bruno's timber? A. Not that I know of.

Q. Around in April you said Bruno came, about how long did he stay to the best of your remembrance?

(Testimony of Edward F. McAllister.)

A. I think he was there for three or four weeks.

Q. Then did he leave?

A. Yes, I believe he left.

Q. And about when did he come back? [281]

A. Well, I don't know. He was in there twice to my knowledge last summer. He must have been there once sometime in June.

Q. At that time were any of Lambert's men or any of Columbia Lumber Company's employees living on Bruno's property or using his equipment? A. Not that I know of, no.

Q. Now, subsequently in the Month of July—during the month of June was any of his property used or any of his equipment used to your knowledge by any of Lambert's men or Columbia Lumber's? A. Not that I know of.

Q. During the month of July was there a change in that? A. Well, yes.

Q. About when, do you know?

A. Well, it would be after the 4th, probably in the range of ten days or two weeks beyond the 4th there was a difference.

Q. Did you receive any instructions or anything of that nature at that time?

Mr. Bell: I object to any instructions. That is purely a conversation with some person in the absence of the plaintiff.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Was there a change and who was your employer about that time?

(Testimony of Edward F. McAllister.)

A. Well, Lambert had left and Earl Proud came up to run the [282] camp.

Q. And did Proud have any—I will withdraw that question. Now, after that time, you say, about two weeks after July 4th was there a change of policy with regard to using this Socha-Bruno's equipment there?

A. I don't know anything about any policy or any agreements; at that time the other two cats showed up there.

Q. They were brought over to the Columbia Lumber's camp, is that right?

A. They got them over there at that time, that is correct.

Q. Do you know how they got over there?

A. Well, they were—one of them was driven over there and I guess the other one was drug over, I don't know, they got there anyway.

Q. Do you know what the condition of those cats were at that time?

Mr. Bell: It is not shown that he is capable of determining what the condition of machinery is. I object to the question.

The Court: Are you a mechanic, sir?

The Witness: No, I am not a mechanic. I am very familiar with logging machinery.

The Court: All right, you may answer.

Q. (By Mr. Boochever): Do you know what the condition was of those caterpillar tractors at that time? [283]

(Testimony of Edward F. McAllister.)

A. They were not in shape to log.

Mr. Bell: I move to strike the answer as not responsive to the question.

The Court: The motion is denied.

Q. (By Mr. Boochever): Now, you say they were not in condition to log? A. No.

Q. What, if anything, was done with these tractors at that time?

A. Well, I don't know what all was done but there were two men working on them there and there was a lot of parts bought and some of those parts are laying there yet to repair those cats with.

Q. And were those cats repaired?

A. There was work done on them. They were never fully repaired.

Q. Were they ever used by your crew or Mr. Proud's crew or Columbia Lumber's in logging operations?

A. Not in the logging operation I wouldn't say, no, the small cat was used to haul supplies from the beach and haul over parts to fix the big cat. As far as logging I don't think either cat ever hauled a log.

Q. Now, subsequently, did you receive any orders from Columbia Lumber Company in regard to those cats at all? A. I received,—— [284]

Mr. Bell: I object to that because the orders if in writing would be the best evidence and oral orders would only be conversation.

(Testimony of Edward F. McAllister.)

The Court: Objection is sustained. You may tell what was done with the cats.

Q. (By Mr. Boochever): What was done with the cats after that?

A. Well, they were taken back to Bruno's.

Q. About when was that, do you remember, about the time?

A. I don't have any idea of the date. I should judge the cats were there about three weeks.

Q. And were returned to Bruno's property?

A. I heard that everything was to go back to Bruno's and the next day we came in and the cats were gone. They were back there.

Q. When the cats were taken back were you still logging there? A. Yes, we were logging.

Q. And did you continue to log after that?

A. Yes.

Q. Now, after the time that the cats were returned there, did any of the men who were working with you there or to your knowledge any of Columbia Lumber's employees ever use any of Bruno's equipment?

Mr. Bell: Now, I object to that unless he knows what was Bruno's equipment. [285]

The Court: Well, he has asked for his knowledge. Just tell what you know?

A. To the best of my knowledge when those cats were taken back I believe that anything that was there that belonged to Bruno was taken back. That is the best of my knowledge. I don't know every

(Testimony of Edward F. McAllister.)

nut and bolt that Bruno owned but as far as I know everything was taken back.

Q. (By Mr. Boochever): And after that was anything used of Bruno's?

Mr. Bell: I object to that for the same reason.

The Court: Objection is overruled.

A. No, there was nothing used of Bruno's that I know of.

Q. (By Mr. Boochever): Now, have you been engaged in logging operations for a long time?

A. Yes, for about 22 years.

Q. Are you familiar with the values of logging equipment? A. Not a cat, I am not, no.

Q. How about a donkey or a hoist?

A. Well, that is a different proposition.

Q. Do you know the donkey or hoist which was there on Bruno's property during the summer of 1948, are you familiar with it?

A. I have seen it, yes.

Q. Was that a good donkey or hoist?

Mr. Bell: I object to that as purely a conclusion. [286]

The Court: Overruled.

A. That was not a logging donkey.

Q. (By Mr. Boochever): It was not a logging donkey? A. No.

Q. What was its condition?

A. I didn't go over it very closely, all I noticed about it, it had a twisted shaft. Outside of that I couldn't tell you anything about it.

(Testimony of Edward F. McAllister.)

Q. Do you have any idea of whether it had any value at all? A. Certainly it had a value.

Q. Approximately what value would it have?

Mr. Bell: I object to that unless it is shown that he knows values at that place.

The Court: Objection is sustained.

Mr. Boochever: I believe I asked him if he was familiar with the values of logging equipment, Your Honor. I will repeat the question.

Q. Are you familiar with the values of logging equipment?

A. As far as donkeys are concerned, I think so.

Q. What would you estimate the value of that donkey as it stood there at that time?

A. The value I don't know. If I was to buy it I wouldn't give over $3,000 for the machine as it stood there.

Q. Did Columbia Lumber Company or did Lambert or any of his men use that donkey at all? [287]

A. No.

Q. Did they take it away and do anything with it? A. No.

Q. In other words it just stayed there all the time?

A. It was never touched; it sat on the beach all summer.

Mr. Boochever: That is all, Your Honor.

The Court: Court will stand in recess until 18 minutes past four.

(Short recess.)

(Testimony of Edward F. McAllister.)

Mr. Boochever: Your Honor, may I have permission to ask this witness one more question?

The Court: Counsel may proceed.

Q. (By Mr. Boochever): Referring to the donkey again, did that donkey have any value for a logging outfit—an outfit interested in logging?

Mr. Bell: I object to that. He has already fixed the value in his opinion.

The Court: Overruled.

Mr. Bell: Exception.

A. Practically, I would not use it for a logging machine.

Q. (By Mr. Boochever): You testified that the equipment was all returned to Agostino property, after that to your knowledge was that donkey ever taken away?

A. You are talking about Bruno's donkey?

Q. That is right? [288]

A. I can't state that as a fact, however——

Mr. Bell: I object to him stating something that he said that he didn't know to be a fact.

The Court: Do you know whether the donkey disappeared or not?

The Witness: Absolutely the donkey disappeared but I saw nobody take it.

Q. (By Mr. Boochever): When did that happen, approximately?

A. I believe that is in the early part of September.

Q. Did the donkey sled disappear at the same time? A. The whole works was gone.

(Testimony of Edward F. McAllister.)

Mr. Boochever: That is all.

The Court: Counsel for plaintiff may examine.

Cross-Examination

By Mr. Bell:

Q. Mr. McAllister, when did you start working in the timber woods?

A. I started along about 1927, something like that, in B.C.

Q. In British Columbia?

A. That is right.

Q. How long did you work over in British Columbia?

A. Oh, I worked there about two years.

Q. Then after you left there where did you go?

A. I worked in Washington.

Q. Washington State? [289]

A. That is right.

Q. And how long did you work there?

A. Well, for quite a number of years up until I went to Oregon about four years ago.

Q. And then you worked in Oregon from that time on up to the time you came to Alaska?

A. I worked back and forth in Oregon and Washington.

Q. Where did you work in Oregon?

A. Well, I worked for the Saganaw Timber Company at Valsatch, Oregon. I worked for Werner Brothers at Taft, Oregon.

Q. Did you always work at the same line of work that you have described here?

(Testimony of Edward F. McAllister.)

A. I have been a high climber for many years.

Q. A high climber? A. Yes.

Q. Will you explain to the jury what that means?

A. Well, a climber is a man that tops the trees and goes up and rigs them and generally rigs the donkeys, rigs them up ready to move the logs. You have more or less the construction of the unit to start logging with and after that you go after it until it is finished.

Q. You say you cut the top out?

A. Cut the top out.

Q. That has been your business practically all your life, has it? [290] A. That is right.

Q. You were never an engineer?

A. I have handled the job at different times. I don't follow it.

Q. You are not a licensed engineer, are you?

A. No.

Q. And I believe you stated you were not a mechanic? A. No, I am not a mechanic.

Q. Could you tell the jury what kind of caterpillars that you are talking about that you referred to as Bruno's cats?

A. Well, Bruno's cats was the big 8 cat and the small 7, one is a Caterpillar and the other is either an International or cat, I believe it is an International.

Q. Would you tell the size of it, please, what designated it?

(Testimony of Edward F. McAllister.)

A. One is a 7 and one is a D-8, that is the common trade name.

Q. Is there any difference between an R.D. 8 and R.D. 7 and a D-8 and D-7?

A. I understand the D.R. was the same as a D-8 and a D-8 cat is larger than a D-7.

Q. These were both rather large cats, were they?

A. One of them was a standard logging cat for size. The other one was a small cat.

Q. Well, now, which was the standard logging size? A. The D-8.

Q. Now, who owned the equipment that you operated there? [291]

A. Columbia Lumber Company.

Q. Now, did they have any D-8 cats there?

A. They have a D-7.

Q. That is what you say is not fitted for logging operations?

A. Well, it is fitted for that particular place but it is not a standard logging cat; it is generally a size larger.

Q. Is that the only cat they had there?

A. At that time they had one 7.

Q. Do you have any other there now?

A. They have two 7's there now.

Q. Are they old cats or new?

A. They are—I believe one has 1500 hours on it and the other has 1100 running hours.

Q. Since they were brought there?

A. Since they were bought.

(Testimony of Edward F. McAllister.)

Q. What year models, are they?

A. I presume they would be last year models, that is, the year before this last one we are speaking of. It would be 1947.

Q. 1947, you think? A. I think so.

Q. You don't think they are '37's?

A. No, absolutely not.

Q. Now, when you went there Blacky Lambert was in charge, was he? A. That is right. [292]

Q. And the same equipment is there now that was there when Blacky was there?

A. There is an extra cat there now.

Q. When did that one come in.

A. About a month ago.

Q. Now, what do you understand to be the equipment that formerly belonged to Bruno Agostino or the Barry Arm Camp?

A. Well, as I understand Bruno's equipment was the D-8 cat and the 7 cat and this donkey he was speaking of. That is all that I know of the logging equipment that he had there.

Q. That is the only things you referred to as Bruno's? A. That is right.

Q. And that is all you know that you meant when you said Bruno's equipment?

A. That is the logging equipment; that is all I know about.

Q. The saw mill is still there?

A. It is still there.

Q. Now, this one-thousand feet between where

(Testimony of Edward F. McAllister.)

Bruno had quit cutting and where Lambert started cutting, that was grass land, was it not?

A. If you ask me, the whole works is grass land but there is scattered timber in there and there are scattered patches, and you go through the timber and you come to muskeg again.

Q. Then about a thousand feet up from there the heavy timber sets in, does it, the better timber?

A. No.

Q. It doesn't? A. No.

Q. Where does it set in?

A. The heavy timber? There is no heavy timber there until you get way up the valley about two miles.

Q. And you haven't got that far in your cutting yet? A. No.

Q. Then when you said that there was about a thousand feet between where Blacky started cutting and where Bruno quit cutting you referred to that period of grass in there?

A. There is timber—what you call timber—there is some trees in there.

. Q. How large are they?

A. They are anywhere from probably 8-inches on the stump to maybe a foot and one-half.

Q. And they haven't been cut? A. No.

Q. They are scattered, I believe you stated?

A. That is scattered, yes.

Q. You don't know where the line was of Bruno's

(Testimony of Edward F. McAllister.)

250,000 board feet that he had bought in there, do you? A. No, I do not.

Q. Now, the parts that were ordered for those cats that you have testified about, do you know whether or not when they came [294] they were not for the proper cats—for those cats?

A. There are parts there now for the small 7 cat that belonged to Bruno and that is the only cat that they will fit. They won't fit anything that the Columbia Lumber has got or anybody else has got.

Q. Were they once put on that cat?

A. No, they hadn't been put on; they had been bought for to put on.

Q. Did you have anything to do with bringing them up from the beach up to that place?

A. No.

Q. Now, weren't those parts for a D-7 and not a R.D. 7?

A. They were—I don't know whether you would call it an R.D. 7, it is a D-7 cat.

Q. You don't know whether those parts will fit it or not?

A. Those pins that are there and those links will fit.

Q. Who furnished the arches that were on those cats? A. There were no arches.

Q. Were there ever any arches on any of the cats?

A. There was an arch on the Columbia cat.

Q. And that is the only one, you are sure?

(Testimony of Edward F. McAllister.)

A. That is right.

Q. And whose arch was that?

A. I guess that was Columbia's, it came up with Columbia's cat. [295]

Q. You are equally sure that there were no arches on any of the Bruno Agostino cats under any circumstances?

A. There were no arches there.

Q. You are sure of that?

A. I am positive.

Q. Did you ever see those cats run or even one of them run? A. I saw the 7 run, yes.

Q. What date did you see it run and where?

A. I can't give you any specific dates about that. It was in the neighborhood of, I would say, between the 5th or the 7th of July and maybe it was the 15th or the 20th.

Q. And how many days did you see it operating?

A. Well, I saw it running at two different times at different days.

Q. Now, where did you see it running; where were you when you saw it running?

A. I was coming in the camp.

Q. Had you been out in the timber woods that day. A. I was out every day.

Q. So what happened during the daytime ordinarily you wouldn't see, of course?

A. Not around camp, no.

Q. Would you know a picture by looking at the picture—would you know the difference between

(Testimony of Edward F. McAllister.)

the Columbia cat—original Columbia cat that they had down there in July, 1948, and the [296] Agostino or the Barry Arm Company camp cats?

A. Yes.

Q. You would know the difference from a picture? A. Yes.

Q. Will you look at that picture and tell me if that has—what do you call it on the front—an arch, does that have an arch?

A. Yes, there is an arch in that picture but it is not on that cat.

Q. Well, where is it, what is it on?

A. It is sitting there by itself. It is not on anything.

Q. It is just directly behind or in front or something that makes it look like it is on the cat?

A. It is in front of the small D-7.

Q. And which one of those is the Agostino cat that you refer to? A. This one here.

Q. Now, what is this cat, what is this?

A. That is an arch. That is not a cat.

Q. That is an arch and does that belong to the Columbia Lumber Company? A. Yes.

Mr. Davis: Your Honor, I might suggest that counsel identify the pictures that he is talking about.

Mr. Bell: It is Plaintiff's Exhibit 28. [297]

The Court: When you say "here" on there you might say the right side or the left side of the picture or something of that kind to identify or hold it up before the jury so that they can see it.

(Testimony of Edward F. McAllister.)

The Witness: All right, Your Honor.

The Court: Otherwise, the testimony is entirely useless.

Q. (By Mr. Bell): I hand you Plaintiff's Exhibit Identification 27 and ask you to state if you see—what do you call it—an arch in that one?

A. This picture, there is an arch in it and it is out ahead of the cat.

Q. Now, which side of the picture is the arch in?

A. Well, the arch is on this side—right hand side.

Q. Now, how do they connect with the cat?

The Court: Which is the arch?

The Witness: This is the arch here and this here is where you couple onto the arch if you are going to haul it or log with it. You cannot attach on up here, that is the blade end, and this is the coupling end.

Q. (By Mr. Bell): And that cat is one you would refer to as Bruno's that one which is Plaintiffs' Exhibit No. 27? A. Yes.

Q. And this one is the D-7? [298]

A. I think that is the D-7.

Q. Do you recognize the place where the D-7 is setting? A. No, I don't.

Q. Do you recognize the place where the D-8 is sitting? A. The exact spot, no, I don't.

Mr. Bell: That is all.

Mr. Boochever: Mr. McAllister, I have one or two more questions.

(Testimony of Edward F. McAllister.)

Redirect Examination

By Mr. Boochever:

Q. Now you mentioned there are two D-7's there now at Columbia Lumber camp now, is that right?

A. That is right.

Q. What vintage are they, what year were they made, what year?

A. They would be 1947 cats, possibly early 1948.

Q. What model were the cats of Bruno's, if you know?

A. That I can't tell you the model, but they were quite a bit older cats. They were four or five years older than those cats.

Q. Now, Mr. Bell asked you about the sawmill, was the sawmill used by Lambert's men?

A. No.

Q. Has it always remained just the way it was when Bruno had it there, to your knowledge? [299]

A. It was just the way as it was when I came there.

Q. Is the sawmill set up for cutting logs and working? A. No.

Q. Now, I would like to show you a sketch here which was made by another witness, Mr. Jacobsen, and ask you if you can tell what this sketch purports to be? The record should show, I guess, that I am showing the witness Defendant's Exhibit F.

A. Well, this is Bruno's camp down here. This is the Columbia Lumber Company camp.

(Testimony of Edward F. McAllister.)

Q. Is that where it is labeled Columbia Lumber camp on the sketch? A. Yes.

Q. Could you show on this sketch approximately where you started cutting timber or would you not be able to do that?

A. It would be over in this district here.

Q. Would you show that to the jury?

A. It would be well, I should judge, up in here some place.

Q. It is hard for you to judge distance, I guess, on the map?

A. That don't quite show the country very good.

Q. About how far above where the last cutting of Bruno's was that?

A. I should judge that would be in the neighborhood of 1,000-1,200 feet.

Q. Now, Mr. Bell brought out that you would go up in the woods every day and you wouldn't be able to see what was going on [300] around camp quite naturally while you were up in the woods, would you be able to know or see if that cat were used in the logging operation—if Bruno's cats were used?

A. In order for them to be used in the logging it would have to be up to where we were logging when they cold-decked this and swung it with the cats.

Q. Were they there?

A. I did not see them.

Mr. Boochever: No further questions, Your Honor.

(Testimony of Edward F. McAllister.)

The Court: Any further cross-examination?

Mr. Bell: No cross-examination.

The Court: That is all, Mr. McAllister, you may step down. Another witness may be called.

(Witness excused.)

Mr. Davis: Your Honor, our next witness will be a rather lengthy one. Does Your Honor wish us to start now?

The Court: I think we ought to make use of every minute we can.

Mr. Boochever: Very well. One other thing, if the counsel for the plaintiffs have no objection would it be permissible for the last two witnesses to be excused from further appearance so that they can get back to work?

Mr. Bell: As far as we are concerned that is all right.

The Court: Very well, Mr. McAllister and Mr. Hooper then may be excused from further attendance with the consent of [301] counsel for both parties.

Mr. Boochever: Mr. Morgan, will you step forward?

No. 12393

United States
Court of Appeals
For the Ninth Circuit.

COLUMBIA LUMBER COMPANY, INC.,
a Corporation

Appellant,

vs.

BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of Barry Arm Camp,

Appellees,

BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of Barry Arm Camp,

Appellants,

vs.

COLUMBIA LUMBER COMPANY, INC.,
a Corporation,

Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 365 to 664)

Appeals from the United States District Court, for the Territory of Alaska Fourth Division.

FILED

FEB 2 - 1950

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL P. O'BRIEN,
CLERK

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THOMAS A. MORGAN

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, sir?

A. Thomas A. Morgan.

Q. And what is your occupation?

A. Manager—General Manager and President of the Columbia Lumber Company.

Q. And what is the Columbia Lumber Company, Mr. Morgan? A. It is an Alaskan corporation.

Q. And how long has it been in existence in Alaska?

A. We were organized as an Alaskan corporation, I believe, in 1947 in the spring.

Q. Do you operate entirely in Alaska?

A. That is right.

Q. Now, Mr. Morgan, what is the business that the Columbia Lumber Company is engaged in?

A. It is rather varied, we manufacture building materials of all kinds as well as lumber. We produce lumber at two different sawmills and distribute the same. We operate tow-boats and other attentive equipment. [302]

Q. How do you usually operate in regard to getting timber to cut?

A. Our policy for many years has been to contract with independent loggers—men to whom we

(Testimony of Thomas A. Morgan.)

will give a contract to produce a specified quantity of timber each year, anywhere from perhaps a million feet to perhaps 10,000,000 feet.

Q. Do you have any control over the manner in which those men operate with regard to how they handle their employees and the detail of their business?

A. We do not. We give each one a contract which is properly set up to give them full jurisdiction and they are in fact an independent contractor—hire the men, fire them, and provide the usual supervision as an independent contractor.

Q. Now, Mr. Morgan, are you familiar with the area around Barry Arm? A. I am.

Q. And has Columbia Lumber secured any timber contracts in regard to that area?

A. We have and still hold two separate contracts to cut timber and one is known as the East Mosquito Flats and the other the West Mosquito Flats.

Q. When did you secure those contracts?

A. The contracts were actually signed in the early part of 1948 but in the fall of 1947 we cruised the area and started negotiations to purchase. We requested the Forest Service [303] to advertise them and subsequently that was done. We advertise in the newspaper.

Q. Did anyone have an opportunity to bid for those areas?

Mr. Bell: I object to that as incompetent, ir-

(Testimony of Thomas A. Morgan.)

relevant and immaterial and not within the pleadings and not an issue here.

The Court: Upon the ground that it is irrelevant the objection is sustained.

Mr. Boochever: Your Honor, I believe it is relevant in view of counsel's opening statement to the jury.

The Court: I do not remember it but I will take counsel's word for it that there was something in the opening statement.

Mr. Bell: I would like to have counsel state for the record what part of the opening statement would make it valid.

Mr. Boochever: I think it should be done outside the presence of the jury. I will be glad to approach the bench.

The Court: It is not sufficiently important; counsel may ask the question and the objection will be overruled.

Q. (By Mr. Boochever): Would you answer the question, please?

A. As is the ordinary custom they are advertised and when they are advertised they ask for bids from all comers and all and everyone has an equal opportunity to bid on the timber and purchase it if he desires.

Q. Who was the timber contracts awarded to?

A. Our bid was the successful bid and subsequently we were [304] awarded the timber.

(Testimony of Thomas A. Morgan.)

Q. When was work started in regard to that timber?

A. Preparations were made in Seattle early in the year. Mr. Lambert was one of the men who made the survey the previous fall and he approached my brother, George, for permission to contract. He wanted to go into the logging business himself and as such cruised the Barry Arm area, liked the timber and an agreement was made with my brother, George, in Seattle in February to log the timber and he was given a contract at that time.

Q. Did he have any authority from you or your brother, George, to bind the Columbia Lumber Company in any agreements of any kind whatsoever?

Mr. Bell: I object to that as merely a conclusion. He could testify to what the facts were but that would be a conclusion as to whether he had authority.

The Court: Objection is well taken and is sustained.

Q. (By Mr. Boochever): Did you ever authorize Mr. Lambert to engage in any contracts or enter into any contracts on behalf of Columbia Lumber Company?

A. No, not as an official of the company or a representative of our company.

Q. Did anyone else to your knowledge who had authority to do so ever so authorize Mr. Lambert?

A. No.

(Testimony of Thomas A. Morgan.)

Mr. Bell: I object to that. How in the world can he tell, that is a conclusion pure and simple.

The Court: The question embraced the phrase, "to his knowledge." It may not be very enlightening but he can say whether he has any knowledge of what somebody else may have done. The answer is negative but it may be asked and answered.

A. No one else had the authority.

Q. (By Mr. Boochever): What authority did Mr. Lambert have?

A. To go into the area and produce timber under his contract.

Q. Now, calling your attention to March of 1948, did you receive any word from Mr. Lambert in regard to this contract?

A. I understood that Mr. Lambert had departed from Seattle with a few of his men to start in at Barry Arm. I made a trip to Seattle on business and while there received a telephone call at the New Washington Hotel at the time and as I recall the communication during the evening—early evening—so they must have called in the late afternoon at Whittier because there is two hours difference.

Q. About when was that, what date?

A. It was the 20th or 21st of March, somewhere in that neighborhood. It was within a day or two.

Q. And what word did you receive from that telephone call?

A. I talked with both Mr. Lambert and Mr. Rowell and they [306] were both very much excited.

(Testimony of Thomas A. Morgan.)

They told me that they had gone to Barry Arm——

Mr. Bell: We object to the conversation with two of his employees outside the presence of the plaintiffs. It would be purely hearsay. Conversation had outside of their presence would never be admissible.

Mr. Boochever: I believe, Your Honor, that plaintiffs' witnesses testified in regard to this same conversation.

Mr. Bell: He was an employee of the Columbia Lumber Company.

The Court: Objection is sustained.

Q. (By Mr. Boochever): What did you say in regard to that at that time; what did you tell Mr. Rowell and Mr. Lambert?

A. I told them then that action would be taken in due course. The information I had been given caused me a great deal of concern personally. It had been conveyed to me—information had been conveyed that indicated that we were being unlawfully kept out of an area or our contractor was, and, naturally, I resented it as any man would. We held contracts with the Forest Service permitting us to go in there at Barry Arm. It was only natural that when we were confronted by a condition there that smacked of force that we would resent it and I did. I recognized it as a maneuver to force us to take over a lot [307] of equipment we had absolutely no use for and did not want to do it.

Mr. Bell: Now, Your Honor, I move to strike.

(Testimony of Thomas A. Morgan.)
I couldn't object to it, I had no anticipation. It is not responsive to the question.

The Court: Counsel sat and listened to the witness make his statement and the motion is denied for that reason. His statement as to his concern and alarm at being held up, of course, is irrelevant.

Q. (By Mr. Boochever): Mr. Morgan, what did you tell Mr. Lambert and Mr. Rowell?

A. I told them that I would notify them within two or three days as to what I could do personally as to coming up here. I was scheduled for a trip in April. I told them that I would come up as soon as I could to see what could be done.

Q. Then, did you do anything after that in that regard?

A. I returned to Juneau and from Juneau I wired them as to my schedule, told them I was coming to Anchorage about the 7th or 8th of April, would come to Whittier and on out to Barry Arm as soon as transportation could be arranged.

Q. Did you state anything in that wire in connection with Mr. Agostino?

A. I told them, as I recall, to proceed into the area and to go ahead with the establishment of Lambert's camp and that I would be up as stated previously and go into the matter with [308] them.

Q. And did you come up then? A. I did.

Q. First of all, either in your conversation or in your telegram did you by any way authorize the purchase of any of Agostino's property?

(Testimony of Thomas A. Morgan.)

A. None whatever.

Q. Then you say you came up there in April, is that right?

A. Yes, I believe I arrived at Whittier on the 9th day of April.

Q. And where did you go from there?

A. We took one of the tow-boats and made a trip to Barry Arm.

Q. And when you arrived at Barry Arm who was with you?

A. Mr. Rowell, our mill superintendent at Whittier.

Q. And who did you see, if anyone, when you arrived at Barry Arm?

A. We met Mr. Lambert and Mr. Agostino.

Q. And did any conversation take place at that time? A. Yes.

Q. What conversation took place?

A. They told me—Mr. Agostino and Mr. Lambert—what had happened up to that time.

Q. What did they tell you in that regard?

A. That at first Mr. Agostino had told them he had no business there and could not land and that is the reason they got so [309] excited and called me. And that they had told Mr. Agostino that I would be up and would talk with him and after getting my wire citing the contracts and our privileges I talked to Mr. Burkick, Juneau.

Q. Who is Mr. Burkick?

A. Assistant Regional Director, Supervisor of

(Testimony of Thomas A. Morgan.)

the United States Forest Service. He confirmed again our privileges.

Mr. Bell: I object to telling about the conversation any further.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Was this told to Mr. Agostino. A. Yes.

Mr. Bell: I believe that is proper to tell what he told Mr. Agostino?

The Court: His conversation didn't disclose that he was saying this to Mr. Agostino; this was just some private conversation between Lambert and Rowell and himself.

Q. (By Mr. Boochever): Was Mr. Agostino present at the time?

A. He was one of the four. He took part in all of the discussions.

Q. Then you can tell what you told in the presence of Mr. Agostino?

A. I told him that we had received the full instructions and [310] authority of the Forest Service and having wired Mr. Lambert to proceed into the area that we were doing so on the assumption that we had a full right to do so and cut our timber under our Government contract and therefore asked him what his idea was in stopping us and what he had talked to these other gentlemen about.

Q. And what did he tell you at that time?

A. He told me that he wanted to sell out, to get out of the area, that he was through logging.

(Testimony of Thomas A. Morgan.)

Q. And did you have any discussion about a sale at that time?

A. I told Mr. Agostino that from what I knew of the equipment and the facilities there we had absolutely no use for them. Our LCT had arrived from — had departed from Seattle. It arrived shortly. But at that time told him that we had everything we needed for logging that area and that we were not interested in purchasing that equipment.

Q. At that time did Mr. Agostino have any employees there who were engaged in logging or preparing for logging work? A. He was alone.

Q. Was there any apparent effort that had been made to set up his camp for logging work that you could see? A. No.

Q. Did——

A. As a matter of fact I had understood sometime before that he was through, knowing it as I did over a period of two or [311] three years, his partners one at a time had pulled out leaving him alone. He had tried several times to secure others to help with the logging without success.

Mr. Bell: I object to that as irrelevant, incompetent and not responsive to the question at all.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Mr. Morgan, will you continue with your conversation with Mr. Agostino on that occasion?

A. He began—he again told me that he wanted

(Testimony of Thomas A. Morgan.)

to sell and instead of the original $25,000 that he had talked to these other gentlemen about, he told me that he would sell for $19,000.

Q. And what did you tell him in regard to that offer?

A. I again hold him that we were not interested in the offer, that the items there were—had only a fraction of that value and that I could see no good reason for us to continue the discussion in an attempt to work out a deal on any such figure.

Q. Did you discuss any other possible basis of working out a deal with Mr. Agostino?

A. That is a little bit hazy in my mind. There was some discussion about a lease.

Q. Did Mr. Agostino agree to any lease?

A. No, there was no conclusion; there was no deal of any kind and he absolutely refused to consider that angle.

Q. Then did you leave the property at that time?

A. I returned to Whittier.

Q. Did you at that time or anytime prior to that authorize any of your employees or Mr. Lambert to use any of Mr. Agostino's property or equipment?

A. As a matter of fact to the contrary I told him I would have nothing whatever to do with it.

Q. Then, subsequently, Mr. Morgan, when did you next see Mr. Agostino?

A. I don't believe I saw Bruno until sometime

(Testimony of Thomas A. Morgan.)
during the latter part of June. Do you want me to relate the conditions?

The Court: I think me may as well suspend at this time. You may step down Mr. Morgan.

Ladies and Gentlemen of the Jury, other matters must be taken up tomorrow morning and I will ask you all to report at 1:30 tomorrow afternoon. Please remember the hour because it is an unusual one and if one of you should be late why it destroys the unity and we cannot proceed until all twelve are here. So please report at 1:30 tomorrow afternoon and we will continue the trial at that hour.

In the meantime I am obliged to remind you of your obligation not to discuss the case among yourselves or with others or listen to any conversation about it and not to form or express an opinion until it is finally submitted to you.

You may retire now and the Court will remain in session.

(Whereupon, at 5 o'clock, p.m., Thursday, June 2nd, 1949, the trial was adjourned until 1:30 p.m., the following day.) [313]

Friday, June 3, 1949

(Whereupon, at 1:30 p.m., the above-entitled matter came on for taking of testimony.) [314]

The Court: Roll of the jury may be called.

(Names of the jurors were called and responded to.)

The Clerk: They are all present, Your Honor.

Mr. Boochever: May it please the Court, we were served with a reply in this matter this morning and we are preparing a motion in regard to that reply. It hasn't been typed yet. I must advise Your Honor of that fact.

The Court: All of these matters may be considered as having been presented and argued and disposed of before the case is finally disposed of. Counsel will preserve that right.

Witness, Mr. Morgan, may resume the witness stand. Counsel may resume the examination.

THOMAS A. MORGAN

called as a witness herein, having previously been duly sworn resumed the stand and testified as follows:

Further Direct Examination

By Mr. Boochever:

Q. Mr. Morgan, I believe when you left off testifying yesterday afternoon, going along chronologically you had reached the month of June, 1948, and you were just telling about receiving word from Mr. Butcher, Attorney for Mr. Agostino. Now, when did you hear from Mr. Butcher?

A. As I recall it was in Juneau about the middle of June.

Q. And what message did you get from him?

A. A——

(Testimony of Thomas A. Morgan.)

Mr. Bell: I object to that for the reason it is not pleadings—it is not within the pleadings and no proper foundation laid.

The Court: Overruled.

Mr. Bell: Exception.

A. A telephone call came from Anchorage to Mr. Butcher asking me when I would next be in Anchorage, that we had discussed with Mr. Agostino certain phases of this Barry Arm deal and he was very anxious to work out something with me in the nature of a deal.

Mr. Bell: I object to him testifying further because he has answered the question.

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Then what did you tell him?

Mr. Bell: Now, I object to that for the same reasons.

The Court: Overruled.

Mr. Bell: Exception.

A. Advised Mr. Butcher that I would be leaving for Anchorage within a few days and would see him upon arrival.

Q. (By Mr. Boochever): When did you arrive in Anchorage, approximately?

A. About the 23rd to the 25th, it might have been the 26th, because I remember our meeting was on the 26th or 27th in Mr. [317] Butcher's office.

Q. And who was present at that meeting?

(Testimony of Thomas A. Morgan.)

A. Mr. Butcher and Mr. Agostino and myself.

Q. What conversation, if any, took place on that occasion?

A. Mr. Butcher presented to me that Bruno wanted to sell the equipment and camp at Barry Arm and on a deal within reason, that is to say, within the range that I was willing to pay for it. I was advised that the price would be——

Mr. Bell: I object to the "being advised" because he is going outside the fields of the conversation now.

Q. (By Mr. Boochever): Who advised you?

A. Mr. Butcher.

Q. At this time and place and in the presence of Mr. Agostino? A. That is correct.

Mr. Boochever: Is the objection still pending?

The Court: Objection was overruled.

Mr. Bell: I withdrew it when he qualified it.

The Court: The objection is withdrawn.

Q. (By Mr. Boochever): Will you continue with your answer, then, Mr. Morgan, please?

A. I discussed the various phases of the deal. I was very reluctant to make a commitment at any price.

Mr. Bell: I object to that as not responsive to the question. [318]

The Court: You must only relate the conversation.

A. And he further told me that probably we

(Testimony of Thomas A. Morgan.)
could get together on something that would be agreeable to both parties.

Q. (By Mr. Boochever): And was an agreement reached at that time?

Mr. Bell: I object to that as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. (By Mr. Boochever): What further was said at that time, Mr. Morgan, to the best of your remembrance?

A. During the discussions of all parties I was informed that the property and the camp would be sold at a figure to be agreed upon.

Q. What was that figure?

A. The final figure was $10,000. I figured that $9,000 was our top deal. I went over the various items of equipment again and Mr. Butcher and Mr. Agostino in the discussion finally made the offer of $10,000 which I subsequently accepted.

Q. By subsequently was that on that same day or the same time or the same conversation or not?

A. Yes, an agreement was reached on that date. I agreed to buy the camp and the equipment and everything there for the figure of $10,000 and certain other—certain terms were agreed [319] to—certain provisions for occupancy.

Q. When was occupancy to take place?

A. Upon the completion of the deal which provided for furnishing a bill of sale listing the property that was being conveyed.

(Testimony of Thomas A. Morgan.)

Q. And then was there to be any written agreement in regard to that?

A. Yes, it was agreed that Mr. Butcher would prepare it.

Q. Was——

A. He was Agostino's attorney and had discussed all the various phases of the agreement and I agreed to have him prepare it and to forward it to me at Juneau since I had to return that weekend and he said he couldn't have it ready in time, so he subsequently prepared the written agreement that was decided upon at that time.

Q. And did he forward such an agreement to you?

A. Yes, I received it in Juneau right after the 4th of July.

Mr. Boochever: I would like to have this letter marked for identification, please.

The Court: It may be so marked.

Mr. Boochever: Defendant's Exhibit No. G.

Q. I show you a letter which purports to be from Mr. Butcher and ask you if you can identify it?

A. Yes, that is the letter that came with the agreement.

Mr. Ross: No objection.

The Court: It may be admitted in evidence and marked [320] Defendant's Exhibit G and may be read to the jury.

Mr. Boochever: "Harold J. Butcher, Lawyer,

(Testimony of Thomas A. Morgan.)

Anchorage, Alaska, July 2, 1948. Mr. Thomas Morgan, Columbia Lumber Company, Juneau, Alaska. Dear Mr. Morgan: Enclosed you will find two copies of contract which I had Bruno sign which set forth the agreement made in this office last Wednesday. Please examine the terms and conditions to determine whether the contract sets forth our agreement as we understood it, and if it does kindly sign copies of the same before a Notary Public, have it acknowledged properly and send one copy back for Bruno.

"We heard you had driven over the highway to Haines and I have thought of doing that myself sometime this summer as a sort of vacation. Kindly let me know how the road was and what difficulties you had with gas and oil. Very truly yours (signed) Harold J. Butcher. Harold J. Butcher."

Now, I will show you Plaintiffs' Exhibit No.—Defendant's Exhibit No. D and ask you—no, that is not the right one. I show you Defendant's Exhibit No. B and ask you if you can identify that document?

A. Yes, this came with the letter. This was the agreement drawn up by Mr. Butcher.

Q. At the time that it came did it have this signature—Bruno Agostino—on it?

A. It was signed and notarized.

Q. Now, Mr. Morgan, you say it was signed and notarized at [321] that time, is that right, by Mr. Agostino? A. That is correct.

(Testimony of Thomas A. Morgan.)

Q. Now, in regard to that agreement was that entirely as you had understood it in the office when you discussed it with and made the agreement with Mr. Butcher and Mr. Agostino?

A. The agreement was basically right with one exception that it did not provide the list of the items that were to be conveyed and which had been agreed upon originally.

Q. Did you make any effort then to see Mr. Butcher in regard to securing such a list?

A. As a matter of fact I came to Anchorage about, I think the 9th of July and called on Mr. Butcher. I wanted personally to discuss it and go over the details again with him and see the list and prepare to comply with the contract which called for the payment on the 11th of July and when I arrived to call on him and found that he had gone to Philadelphia to the Democratic Convention, so I could not contact him.

Q. So did you stay in Anchorage for a period of time that time?

A. I was in Anchorage several days and went to Whittier out, I think, to the woods, back to Anchorage and he had not returned, and since I had to go back to Juneau, discussed the matter with our attorney?

Q. Who was your attorney there that you discussed it with? A. Mr. McCarrey. [322]

Q. Did you then give any notification to Mr.

(Testimony of Thomas A. Morgan.)
Butcher or to Mr. Agostino in writing about this contract?

A. I did several things, I signed the contract, issued the checks that were called for to comply with our part of the agreement, delivered them to our attorney and notified Mr. Butcher in writing.

Q. I show you Defendant's Exhibit for Identification No. C and ask you if you can identify this exhibit?

A. That is the letter I wrote at that time.

Q. Was that mailed to Mr. Butcher?

A. It was put in the mail on that date.

The Court: Counsel may proceed. I think this exhibit has been already introduced in evidence and read.

Mr. Boochever: No, Your Honor, it was just introduced for identification.

The Court: It hasn't been admitted, then?

Mr. Boochever: No, sir.

The Court: Very well.

Mr. Boochever: At this time I wish to offer this letter in evidence as Defendant's Exhibit H.

Mr. Bell: We object to it for the reason that it is a self-serving declaration, incompetent, irrelevant and immaterial and no proper foundation laid.

The Court: Objection is overruled, it may be admitted and may be read to the jury. It will be introduced as Defendant's [323] Exhibit C, then.

Mr. Boochever: Very well, Your Honor.

"Columbia Lumber Company of Alaska, Anchor-

(Testimony of Thomas A. Morgan.)

age, July 19, 1948. Mr. Harold Butcher, Attorney at Law, Anchorage, Alaska. Dear Mr. Butcher:

"Conformant with your letter of July 2, 1948, I arrived in Anchorage on July 10th and brought the contract back with me to discuss it with you.

"I have been advised that it will be another week before you return and find business conditions such that I am unable to wait any longer.

"The contract you have prepared is acceptable to the Columbia Lumber Company for the most part, except for the fact that no place is itemized the personal property we are getting for the purchase price of $10,000. That is the reason why I came personally so that I could discuss that portion of the contract with you. I am sure you would not expect me to sign it without a definite understanding as to what the $10,000 is going to purchase.

"I have signed a check in the sum of $3,300 and left it with Mr. C. D. Summers, with instructions to pay it to the Clerk of the Court upon your giving him an acceptable list of all the personal property which the Columbia Lumber Company is to get under the contract.

"Sorry I didn't get to see you and trust that you will be [324] able to work this out with Mr. Summers immediately upon your return.

"Yours very truly (signed), Thos. A. Morgan. Thomas Morgan, President, Columbia Lumber Company."

(Testimony of Thomas A. Morgan.)

Now, Mr. Morgan, did you make out any checks at that time?

A. Yes, we made out the $3300 check specified there, and since the time was up calling for the initial payment of seven hundred and since I had found it necessary to return to southeastern Alaska——

Mr. Bell: I object to the continuing to talk. He has answered the question.

Mr. Boochever: No, Your Honor, he has not answered the question.

Mr. Bell: You asked him if he made out a check.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, he made out more than one check and he is telling what checks he made out.

The Court: He may tell about all the checks he made out but he finished up with some talk of a journey to southeastern Alaska and that hasn't anything to do with checks that I know of.

Mr. Boochever: Yes, it does, because it explains why he made out more than one.

The Court: He can tell about making out the checks. Confine yourself to answering the questions, Mr. Morgan. [325]

A. The third check for the August payment which would be due August 11th under the terms of the contract.

Q. (By Mr. Boochever): And you made out all of these checks in July?

(Testimony of Thomas A. Morgan.)

Mr. Bell: I object to that as leading.

Mr. Boochever: Withdraw the question. I am sorry.

Q. When did you make out those checks?

A. They were made up at the time the contract was signed which was about the middle of July. As I recall, on the 10th or 11th while I was here and before I went to Whittier.

Q. What did you do with those checks, Mr. Morgan?

A. The checks and the signed contract I turned over to Mr. McCarrey to handle for me in the event Mr. Butcher arrived in Anchorage while I was gone.

Q. And did you give Mr. McCarrey any instructions with regard to those checks?

Mr. Bell: I object to that as to what he would instruct his attorney.

The Court: Overruled.

A. I requested Mr. McCarrey to act for us to accept the list that would be provided under the agreement and to release the checks to conclude the deal.

Q. (By Mr. Boochever): Now, your letter of July 19th mentioned a Mr. Summers, is there any reason why you did not leave the checks with Mr. Summers? [326]

A. While I was here in July it was determined that we would have to have a representative in Fairbanks and Mr. Summers was acquainted up

(Testimony of Thomas A. Morgan.)
there having been there, so he was the one selected, subsequently went to Fairbanks. The checks that mentioned there as well as the other two were left in the office in the safe in the custody of Mr. Smith for a matter of two or three days over a weekend and I think the following Monday——

Mr. Bell: I object to what he "thinks" from here on out and I object further, it is not responsive to the question.

The Court: Overruled.

Mr. Bell: Exception.

A. So, Mr. Smith, my assistant, personally delivered the checks to Mr. McCarrey.

Mr. Bell: I move to strike that because it is quite clear—he stated he was away from here.

The Court: Do you know whether Mr. Smith delivered these checks to Mr. McCarrey other than what Mr. Smith told you?

The Witness: I do, Your Honor, because they were acknowledged shortly by Mr. McCarrey and he has them in his possession and has ever since.

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Now, Mr. Morgan, did you discuss this matter with your [327] attorney, Mr. McCarrey, at that time, too?

Mr. Bell: Now, I object to that for the reason there is no proper foundation laid; there is nothing in the pleadings to indicate that Mr. McCarrey ever discussed it with these people, therefore his state-

(Testimony of Thomas A. Morgan.)

ments to McCarrey would be purely hearsay and McCarrey's to him would be purely hearsay and, of course, McCarrey is not here to testify. He is out of town.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Mr. Morgan, after the contract had been signed and left with Mr. McCarrey what did you do in regard to the property at Barry Arm?

A. I was concerned about the delays, the season was advancing.

Mr. Bell: Now, I move to strike his speech and just ask that he answer the question.

The Court: I didn't understand the answer anyhow.

A. I was concerned about the advancing season and wanted him to——

The Court: Just limit—just eliminate all of these preliminary statements and answer the question.

Q. (By Mr. Boochever): What did you do in regard to the property, Mr. Morgan, just state what you did, not what your reasons for it were?

A. Secured legal advice that I was entitled to receive under the contract and informed our foreman that Barry Arm camp—at [328] our camp—that a contract had been included and to proceed with the repairs of the tractors at that time.

Q. Do you know whether the foreman at Barry Arm proceed to make repairs on the tractor?

(Testimony of Thomas A. Morgan.)

Mr. Bell: I object to it unless he knows of it of his own personal knowledge.

The Court: Yes. Overruled. If you know of your own personal knowledge answer, if not do not answer.

A. Yes, subsequently the tractors were taken to our camp and put in the shops and repairs were started.

Q. (By Mr. Boochever): And was it necessary or not to purchase any parts in order to repair those tractors?

A. Yes, they required a lot of parts.

Q. Were those tractors that formerly, I believe, that Mr. Agostino claims he owned? Were they the same model as your tractor that you had there at the camp?

A. No, these machines were R.D. models, approximately ten years older than ours.

Q. Were the parts interchangeable with your tractor? A. Very few, if any.

Q. And did you have a mechanic work on those two tractors which were taken over from Mr. Agostino's camp?

A. As a matter of fact we had two mechanics working on them.

Q. And approximately how much was spent on the mechanics' [329] wages and on the parts in repairing those tractors?

Mr. Bell: I object to that for the reason it is incompetent, irrelevant and immaterial and no

(Testimony of Thomas A. Morgan.)

proper foundation has been laid for the question.

The Court: Objection is overruled.

Mr. Bell: Exception.

A. Approximately $2,000 in parts and repairs. Some of the parts are still there having come in after the tractors were returned which have not been returned and I am very doubtful if of any value to us since it being an old model and they were flown up.

Mr. Ross: Object to the witness going on and telling about the parts not being usable.

The Court: Objection is sustained.

Mr. Bell: I move to strike that part of the answer.

The Court: Well, that part of the answer may be stricken.

Q. (By Mr. Boochever): Were the parts which came for these two tractors usable by you in your tractors?

Mr. Bell: I object to that for the reason it is incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in this case.

The Court: Overruled. You may answer.

A. Very few, perhaps a few plugs.

Q. (By Mr. Boochever): [330] Now, Mr. Morgan, subsequently did you keep those two tractors?

A. They remained at our camp for a period of perhaps one month.

Q. And then what was done with them?

(Testimony of Thomas A. Morgan.)

A. In the meantime——

Q. Answer the question, please.

A. They were returned to Barry Arm camp to Bruno Agostino.

Q. Why were they returned to the Barry Arm camp?

Mr. Bell: I object to that as calling for a conclusion of the witness.

The Court: Overruled.

A. Because at that time I had received information that the deal would not be concluded, that Mr. Agostino had refused to comply with his portion of the agreement.

Q. And what did you do when you received——

Mr. Bell: Now, I move to strike that for the reason it is incompetent, irrelevant and immaterial and not within the pleadings, no proper foundation laid and not made competent by any previous statement.

The Court: Overruled.

Mr. Bell: Exception.

The Court: Pardon me. The motion is denied, exception will be noted.

Mr. Boochever: Read the question.

(Question read.) [331]

Mr. Bell: Now, Your Honor, I renew my objection for the reason that his answer—my motion to strike his answer was not responsive to the question and it was not competent, if it was, because he received some information.

(Testimony of Thomas A. Morgan.)

The Court: Motion is denied.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Will you now answer the question, please, Mr. Morgan?

A. I believe I did answer that particular one.

Q. What was done when you received the word that Mr. Agostino was not going through with the agreement, if anything was done?

Mr. Bell: I object to the question based upon a supposition that he received some word unless he establishes who he received the word from and whether or not it was from someone who was authorized to represent the plaintiffs.

The Court: The objection is overruled.

Mr. Bell: Exception.

A. The question now, as I understand it, is that what was next done?

Q. (By Mr. Boochever): That is right, Mr. Morgan.

A. Instructions were sent to camp one foreman notifying everyone connected with our operation to return the equipment—all parts supplies or anything that belonged to Bruno—to the place at which it was found originally and as it was and to [332] instruct our boom man, Mr. Hooper, to vacate the premises which he had occupied for the past thirty days approximately.

Q. And did you get in touch with Mr. McCarrey in regard to that?

(Testimony of Thomas A. Morgan.)

A. I did. I had been in touch with him on numerous occasions.

Q. And did you tell him anything in regard to the taking back of the property?

A. I informed him that we had returned everything belonging to Mr. Bruno Agostino.

Q. Mr. Morgan, did you ever have occasion to learn the tractor numbers of the two tractors which Bruno Agostino claimed he owned?

A. Yes, I checked them myself during the early part of 1948, as I recall, the first trip, when Mr. Lambert and Mr. Agostino, Mr. Rowell and I discussed the possibility of the deal.

Q. Have you subsequently written down those numbers anywhere?

A. I believe I have them with me.

Q. Can you read what those numbers were?

A. The R.D. 7, No. 9G4602WST and the R.D. 8, No. 1H2364SP.

Q. Now, Mr. Morgan, do you know Mr. Raymond Grasser—Ray Grasser or Roy Grasser?

A. I do.

Q. When and where did you see him first?

A. At Whittier on the way to Barry Arm camp, probably three years ago. [333]

Q. And calling your attention to September of 1948, did you see him at any time during that month?

A. Mr. Grasser arrived in Whittier and approached me regarding——

(Testimony of Thomas A. Morgan.)

Mr. Bell: Now, I object to the rest of the statement.

Mr. Boochever: Just answer my question, please, Mr. Morgan, did you see him at that time?

A. Yes, he came to Whittier in early September.

Q. And at that time did you have any conversation with Mr. Grasser?

A. He asked me if we would——

Mr. Bell: I object to him stating any of the conversation. He can answer the question.

Q. (By Mr. Boochever): Did you have a conversation with him? A. I did.

Q. What was the subject of that conversation? Not what was said by Mr. Grasser but what was the subject of the conversation.

Mr. Bell: I object to that for the reason it would be hearsay and not in the presence of the plaintiffs here and not binding on the plaintiffs and nothing could be said that would be binding on them.

The Court: Overruled.

Mr. Bell: Exception. [334]

A. I was requested to lease our——

The Court: No.

Q. (By Mr. Boochever): I want to know what the subject of the conversation was?

The Court: Your counsel is smart enough to ask you the questions, you just answer them.

A. Regarding the procurement of our barges and tugs for a trip to Barry Arm to remove equipment.

(Testimony of Thomas A. Morgan.)

Q. (By Mr. Boochever): And what did you tell Mr. Grasser?

Mr. Bell: I object to that for the reason on the same grounds—it would not be binding on these plaintiffs here.

The Court: Overruled.

Mr. Bell: Exception.

A. I told him under no circumstances would we consider such a deal; that we had no authority and could not participate in any way.

Q. (By Mr. Boochever): Did you tell him anything in regard to whether you claimed those tractors or not?

Mr. Bell: I object to that for the same reason.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Then, Mr. Morgan, did you do anything about giving him a barge or letting him lease a barge or anything of that nature? [335] A. We did not.

Q. Did you see Mr. Grasser subsequently?

A. I saw him again about the end of September.

Q. Where was that? A. At Whittier.

Q. Where were you then?

A. I was at Whittier at the plant.

Q. And what was Mr. Grasser doing at that time?

A. He came down to go aboard the LCT MahinaOho.

(Testimony of Thomas A. Morgan.)

Q. Do you have any interest in that vessel or the company that owns it or the management of it or anything of that nature?

A. None whatsoever.

Q. And what did he do with that vessel, if you know?

A. I saw the boat departing in the direction of Barry Arm last.

Q. And after that do you know whether the tractor and donkey which Mr. Agostino claims were there at Barry Arm after that time?

A. My next trip, which was shortly thereafter, the machines—the two tractors as well as the donkey—were gone.

Q. Do you know whether or not Columbia Lumber Company ever authorized the removal of those —the donkey and the tractors— from the property of Mr. Agostino there at Barry Arm?

A. We did not.

Q. To your knowledge did any Columbia Lumber Company employee ever have anything to do with removing them after they were [336] returned in early September from Mr. Agostino's property?

A. To my knowledge, no.

Q. Do you know whether the other tractor which was there remained there, which you say your men returned to Barry Arm, remained there?

A. Pardon me, you mean whether there was one of Bruno's tractors remaining there?

Q. That is right.

(Testimony of Thomas A. Morgan.)

A. Both of the tractors and donkey I mentioned a moment ago were gone.

Q. Subsequently gone? A. Yes.

Q. Now, Mr. Morgan, I want to go into one other matter with you in regard to the timber there. I believe you testified that Columbia Lumber Company purchased a timber contract. Now, have you examined at all where the timber was cut by Columbia Lumber?

A. Yes, I have covered the area fairly well and I believe I could testify as to where it was cut.

Q. Do you know where Bruno Agostino's contract—where his timber was located?

A. On the southern part of the area directly behind his camp along the hillside adjoining.

Q. And to your knowledge did Columbia Lumber Company, any of its employees or Mr. Lambert, its independent contractor, ever [337] cut any of Mr. Agostino's timber?

A. I know the Columbia Lumber never cut a single tree and I am confident that Mr. Lambert did not.

Mr. Boochever: Your Honor, I am wondering if we might have a five-minute recess at this time before concluding the examination of this witness?

The Court: Court will stand in recess until 2:15.

(Short recess.)

The Court: Record will show all the jurors present and counsel may proceed with the examination.

Q. (By Mr. Boochever): Mr. Morgan, referring

(Testimony of Thomas A. Morgan.)

to the two caterpillar tractors claimed to be owned by Mr. Agostino, what was their condition when they were taken over by the Columbia Lumber Company toward the end of July, 1948?

Mr. Bell: I object to that unless he is first qualified to show what their condition was.

Q. (By Mr. Boochever): I will change that question. Do you know what their condition was?

A. I do.

Q. What was their condition?

A. Individually or generally?

Q. Well, each one, yes.

A. The R.D. 7 had no towing winch and no blade dozer. The [338] machine was basically sound, tracks were quite worn and would have required a lot of work before it could have been used for our purpose.

The R.D. 8 was in much poorer condition, having shown the effect of salt water. It had no blade and no towing winch but was equipped with sort of a carry-all attachment, two small drums at the rear of the machine, which, of course, would not be usable in our work. The motor of the R.D. 8 appears to require work and could not be operated as it was until it had been gone through thoroughly to be sure the rust and all the sediment could be taken out.

The donkey, so-called, hoist in reality because the gears—the drums were geared alike and was not a logging unit, the main shaft was sprung and I

(Testimony of Thomas A. Morgan.)

could not determine the condition of the motor because we did not go into that that carefully.

Q. Did your men ever take possession of the donkey or use the donkey in any manner?

A. It was never touched.

Q. With regard to the tractors there, what type of tractor was most suitable for logging under the conditions that existed there at Barry Arm for your timber contract and the portion of it upon which you proceeded to log in 1948, upon which Mr. Lambert—— A. We chose the D-7.

Q. What was the reason for that?

A. It is more suitable. The timber was smaller. The D-7 [339] it was lighter; it didn't bog down like a heavy D-8.

Q. Now, were two tractors needed for your operation there or were you able to get along with one tractor?

A. We got along very well with one.

Q. Now, Mr. Morgan, one other question, after the contract which you refer to as having been made at the end of June and which was reduced to writing was entered into there, were you at all times ready and willing to go through with that contract?

Mr. Bell: I object to that purely as a conclusion.

The Court: Overruled.

A. I was always ready and still am glad to complete the deal right now if we could on the terms of our original agreement.

(Testimony of Thomas A. Morgan.)

Mr. Boochever: That is all, Your Honor.

The Court: Counsel for plaintiffs may examine.

Cross-Examination

By Mr. Bell:

Q. Did you ever see Bruno Agostino after the day you saw him in Mr. Butcher's office until this trial started?

A. I am just trying to think. I have seen him so many times at different places at different times. I am just not sure about that, Mr. Bell.

Q. Had you met with him two or three times before that or after the conference between you and he at Barry Arm camp on April 10th and the time you met him in Butcher's office, had you met him several times? [340]

A. I can't testify during that particular period but I do remember trying to find him in August.

Q. Well, that was after this suit was filed, wasn't it? A. That is correct.

Q. You never tried to find Bruno at any time until after August, did you?

A. No, as a matter of fact I did not. After August, you say, after April?

Q. I say from July—June, it was in June that you met Bruno in Mr. Butcher's office, wasn't it?

A. That is right.

Q. Now, you never tried to find Bruno at any time after that until late in August, you say?

A. I believe that is correct.

Q. Do you know Mr. Socha? A. Yes.

(Testimony of Thomas A. Morgan.)

Q. Do you know where he lives here in town?

A. No.

Q. You know that he does live there, don't you?

A. I have heard that he does.

Q. You never did talk to him either, did you, Mr. Morgan?

A. No, but we discussed it when we were trying to find Bruno.

Q. No, not what you discussed with someone else, tell me what you did in trying to find Bruno, not by discussing among yourselves something.

A. I tried to locate Bruno through Mr. Butcher, his attorney.

Q. And that was after you knew that Mr. Ross had been employed and Mr. Butcher was no longer his attorney, isn't that right?

A. No, you are not correct.

Q. Why do you state that after talking to Mr. Butcher, "I told him to go ahead and prepare the contract for me." Now, what did you mean by that? "Go ahead and prepare the contract for me."

A. Ordinarily our attorneys prepare all our contracts. I was perfectly agreeable to have him draw the contract as agreed upon by the three of us, meaning by "us" probably other than me because we were all involved.

Q. Just when did you sign that contract? What date did you sign it?

(Testimony of Thomas A. Morgan.)

A. The exact date would be hard to state because it was sometime in July.

Q. Who saw you sign it?

A. Mr. McCarrey.

Q. When did you sign it? Where did you sign it? A. In his office.

Q. Here in Anchorage?

A. That is correct.

Q. And you are positive that that was sometime in July?

A. As nearly as I understand I made so many trips and calls at his office so many times that the exact date would be hard to certify to but as I recall it was during that period. [342]

Q. Would you state positively that that wasn't after this lawsuit was filed?

A. I knew of no lawsuit when I signed the contract. As a matter of fact, Mr. Butcher was still representing Mr. Agostino.

The Court: Pardon me. I think it is only fair to say to the witness that the lawsuit was filed, according to the Clerk's stamp, on August 1st, 1948.

Mr. Bell: I am glad you put that in the record for us, Judge, because I didn't know the date.

Q. When did you first hear from Mr. Ross about this matter?

A. I am not able to say that; as I recall, the letter came in it was in the fall sometime. I turned it over to Mr. McCarrey.

Q. It was in August, wasn't it?

(Testimony of Thomas A. Morgan.)

A. It doesn't occur to me it was that early, although it could have been late August or early September, because as a result of the letter, knowing that Mr. Bruno had failed to carry out our agreement——

Mr. Bell: Just answer the questions and let's not have any speeches.

The Witness: All right.

Q. (By Mr. Bell): Now, then, you never wrote Mr. Ross or told Mr. Ross at any time that you had ever signed this contract until after this suit was filed, did you? [343]

A. Not personally. My attorney was handling that.

Q. Why didn't you send a copy—signed copy—to Bruno Agostino?

A. Mr. McCarrey handled that and apparently insisted that the original agreements——

Q. I am asking you why didn't you do it? You introduced a letter that Mr. Butcher wrote you asking you to sign them and send a signed copy for Bruno Agostino, now why didn't you do that?

A. Because the contract had not been complied with.

Q. Well, why did you sign it later, then?

A. I was advised that in order to complete our part of the deal we would have to sign and put up the checks and proceed accordingly. Having done so we complied.

Q. Now, just to refresh your memory, Mr. Mor-

gan, I may be wrong, wasn't that after the suit was filed and your attorney advised you you had better sign this contract?

A. Oh, no, that was a month or two before at least, probably two.

Q. Why didn't you tell Bruno or why didn't you write Bruno, why didn't you tell somebody that you had signed it?

A. I just told you—I tried to find Mr. Bruno and I had other people try to locate him, too.

Q. And you didn't write him a letter?

A. Mr. McCarrey may have. He was in touch with Bruno. [344]

Q. Why didn't you do it?

A. Because Mr. McCarrey was our attorney handling the entire matter for us.

Q. You didn't employ Mr. McCarrey in this matter until this suit was filed?

A. Mr. McCarrey represented us during the entire period early in the year.

Q. In this matter? A. And others, too.

Q. Why didn't you tell Mr. Butcher that Mr. McCarrey was representing you?

A. I tried to find Mr. Butcher even when he got back from Philadelphia. His office was torn up. I tried to locate him.

Q. Did you ever see Stanley Socha anywhere and talk to him about October 31st?

A. I did not.

Q. Of this year?

(Testimony of Thomas A. Morgan.)

A. I haven't seen him, in fact, until in this court room for probably about two years. He left Barry Arm and Whittier area sometime ago.

Q. And you haven't seen him for two years until you saw him in the court house?

A. That is my recollection.

Q. Now, did you see Mr. Agostino in October—on July the 10th, 1948? [345]

A. No, I did not.

Q. Didn't you hear your witness yesterday testify that you were there at the Columbia Lumber Company camp and that he and Agostino signed that timber extension?

Mr. Boochever: Objection, Your Honor, that is an incorrect statement of what was testified yesterday. The witness definitely stated that Mr. Morgan was not there.

The Court: Well, the counsel is asking the witness whether such testimony was given or whether he heard such testimony, which I think is proper, and the witness can say whether he remembers any such testimony.

Mr. Boochever: But, Your Honor, I don't think that there is any relevance to asking him whether he heard testimony here in court as to what was said in court here here; it doesn't seem relevant at all.

The Court: It may serve to refresh his recollection, at least. Overruled.

Q. (By Mr. Bell): Did you hear this Mr. Jacob-

(Testimony of Thomas A. Morgan.)

sen testify yesterday about the signing of that timber extension? A. I did.

Q. And did you hear it said in there that it was done on a lumber pile near your office in Whittier?

A. I did.

Q. And didn't you hear him say that you were there at the [346] time?

A. At the plant in Whittier at the time, as I recall I possibly was.

Q. You were at that plant on July 10th, 1948, weren't you?

A. I would have to investigate the records to be sure.

Q. Well, can't you remember where you were along about that time?

A. Unfortunately, no, Mr. Bell. I travel around a lot. I am on the go practically constantly. I did keep 'plane records.

Q. Do you have records with you now to see where you were on July 10th, 1948?

A. I am afraid I do not have detailed records, but you may be basically right. I know I was up here during that period and if I wasn't at the plant that day I was within a very few days because as I recall I came up here to see Mr. Butcher and about the 8th or 9th——

Q. Did you talk to Mr. Jacobsen about getting this extension signed by Bruno?

A. No, I had nothing whatever to do with that.

Q. Did you ever talk to Mr. Jacobsen about it

(Testimony of Thomas A. Morgan.)
at all?

A. He told me later the extension had been granted.

Q. Just a voluntary statement that the extension had been granted, that is what he said?

A. That is right.

Q. I will ask you if you didn't know what you had down there [347] on the grounds when you were down there talking to Bruno and to Ted Rowell and Mr. Lambert right there at Barry Arm camp on April 10th, I will ask you if you didn't know what was there?

Mr. Boochever: Excuse me, Your Honor, I object to that question as too general.

The Court: Overruled.

A. The basic items, yes.

Q. You knew what cats were there, didn't you?

A. That is right.

Q. You knew that you had an R.D. 8 and an R.D. 7 there near where you were talking, didn't you? A. I did.

Q. You knew that the bunkhouse was in sight of you, didn't you? A. That is right.

Q. You knew where the donkey engine sat?

A. Correct.

Q. And you saw the sawmill sitting there, didn't you? A. Yes.

Q. Now, you did know where the pond was, didn't you? A. That is right.

(Testimony of Thomas A. Morgan.)

Q. And the number of piling, approximately how it was built, don't you?

A. That question I will take exception to, Mr. Bell, because to my knowledge there was no piling except a few little set [348] post in front of the so-called sawmill.

Q. And that is all you saw were just some little set post at the sawmill?

A. Near the sawmill.

Q. So all these other men who testified about the piling were wrong?

A. I believe Mr. Jacobsen confirmed my remarks and one or two others that there were a few pilings in front of the mill.

Q. And that was the only ones that were ever there?

A. In fact one of your pictures will show them.

Q. That is all you ever did see there in front of the sawmill?

A. We drive pilings all the time; it is necessary. The storms cash them out.

Q. You knew where the roads were, didn't you?

A. That is right.

Q. You knew the roads were necessary for your timber operations to get your logs to deep water?

A. That is not correct. We have not used his roads to haul a single log on.

Q. How do you get them down to tidewater?

A. They are floated down the river. They are hauled from our spar trees by tractors above our

(Testimony of Thomas A. Morgan.)
own camp which is three-quarters of a mile north of Bruno's, so we don't have occasion to use any of their roads.

Q. How did you do it when you were cutting Bruno's timber? [349]

A. That question has been answered. We never cut Bruno's timber.

Q. It is still standing?

A. To my knowledge.

Q. When were you there last?

A. October of last year.

Q. Do you know where Bruno's timber was that he had paid for in October—October 31st, 1947, do you know where that 250,000 feet board measure was standing?

A. I know his logging area. I don't have any knowledge that there was such a patch of timber except possibly a small corner way back up on the hillside.

Q. That would be over on some other creek other than where he was operating, would it?

A. No, the same area.

Q. Way up on a hillside, was it?

A. Back from the water quite a distance, yes.

Q. Now, did you ever tell Bruno or the plaintiffs or Mr. Butcher that you had signed this contract?

A. Not personally because I didn't see Mr. Butcher.

Q. Now, did you ever tell Mr. Butcher or Mr. Ross, Mr. Agostino or Mr. Socha that you had ever

(Testimony of Thomas A. Morgan.)

written these checks? A. Mr. McCarrey——

Q. Answer the question, don't dodge it.

A. No, I did not. I haven't see them. Mr. Ross came into [350] the picture after we returned everything and the deal was off.

Q. You never told anybody except your own attorney and somebody in your employee that you wrote these checks? A. That is correct.

Q. And you never told the Court Clerk here that you wrote the check for him for $3300, did you?

A. That is right.

Q. And you never did deliver it to him and it has never been delivered to this date, has it?

A. That is correct.

Q. You didn't make a deposit at the Bank of Alaska to Bruno Agostino's account as provided in the contract, did you?

A. The contract did not provide it until it was completed; it was not a deal until it was completed. He did not comply with his part of it.

Q. I thought you said you completed?

A. I completed my portion of it and there was a clause which entitled me to go ahead under that.

Q. Did you ever deposit any money in the Bank of Alaska to Bruno's account?

A. Not at the Bank of Alaska.

Q. Did you deposit any money anywhere to Bruno Agostino's account as provided in that contract? A. No, the checks were only written.

Q. And left in one of your employee's hand?

(Testimony of Thomas A. Morgan.)

A. And delivered to Mr. McCarrey to complete and handle for us.

Q. And you don't know why that somebody wasn't informed of that fact, do you?

A. I am satisfied that Mr. Butcher was informed of the fact, Bruno's attorney.

Q. Have you talked to Mr. Butcher since you have been in town? A. Yes, sure.

Q. And you are going to have him here as your witness, aren't you? A. That is correct.

Q. How many times were you at Barry Arm camp during the year of 1948 or during the summer, we will say? A. Oh, four or five, probably.

Q. And did you ever see Bruno Agostino there after the 10th day of April, 1948?

A. I don't recall having seen him. I understood he passed through Whittier at the time Mr. Jacobsen was there but I don't recall having seen him at any time during that period.

Q. I will ask you if you didn't have Mr. Agostino to meet you here in town in June of 1948?

A. That is right.

Q. And didn't you have him meet you up to your lumberyard here?

A. I don't recall that. I remember meeting him at Mr. Butcher's [352] office.

Q. Didn't you first meet him up at your lumberyard at your office here?

A. The night before—the night, I believe he did

(Testimony of Thomas A. Morgan.)

come down that way and I saw him briefly and we met the next day.

Q. Didn't you tell him to wait a little bit that you would be back and you didn't go back?

A. I don't recall that.

Q. Did you have some emergency come up or something that day that you know of?

A. No, not to my knowledge.

Q. Did you have an emergency come up the 12th day of April of 1948 on the 11th?

A. No, not to my knowledge.

Q. Why didn't you go back and see Bruno in two days at his camp like you promised him you would on the 10th of April?

A. That is absolutely wrong, Mr. Bell. I made my trip as I promised to make and after I concluded my business there I immediately carried out the rest of my schedule.

Q. Did you know that Bruno sat there and waited for you approximately three weeks do you know that?

A. Not at all. I have no knowledge of that and no reason for him to wait because there was no plan to come back.

Q. You did tell Blacky Lambert to start up the machinery, didn't you? [353]

A. Now that is a question that puzzles me. I know that something was said about trying them out and I don't recall actually authorizing him to. He wanted—he said, I think, we ought to check the

(Testimony of Thomas A. Morgan.)

machines, look them over and possibly see if they will start.

Q. And then you told him to start them up?

A. Not as an order.

Q. Did you tell Bruno there that you would be back and see him in a couple of days?

A. I did not.

Q. Well——

A. I had no schedule—I had a schedule to maintain.

Q. You had no intentions of seeing him in two days? A. No, not in two days.

Q. Did you intend to pay him anything for the privilege of taking over his camp and his tractors and everything?

A. Why should we, Mr. Bell, we didn't take it over. We had nothing to do with it.

Q. You were informed that you couldn't land there, that it was a one-man operation and that you couldn't land there unless you bought him out, by Mr. Lambert and Mr. Rowell, weren't you?

A. That is right.

Q. Now, then, they did tell you the price he wanted, didn't they?

A. I don't recall that, not over the 'phone. Are you referring [354] to the 'phone conversation?

Q. Yes. A. Oh, no.

Q. Did they tell you anywhere prior to the 10th day of April what Mr. Agostino said?

A. I think I did hear before I went up there, yes.

(Testimony of Thomas A. Morgan.)

Q. Did Mr. Lambert tell you that?

A. Yes, I believe, in our discussions he mentioned——

Q. And he told you he wanted $19,000 for the machinery—for the machines and equipment—and $6,000 for the buildings and timber rights?

A. I think that was what he told me before we started discussing it at Barry Arm.

Q. Now, then, you did tell Ted Rowell and Blacky Lambert to go in there and take over, didn't you?

A. I wired Mr. Lambert to proceed under the terms of our contract with the Forest Service.

Mr. Bell: Read the question.

(Question read.)

A. No.

Q. You didn't do that?

A. I did not tell Mr. Rowell and Mr. Lambert to go in and take over. If I may tell you what happened?

Q. No, I am asking you if you did that? You heard Mr. Lambert testify that you did direct him to—— [355]

Mr. Boochever: Excuse me, I believe the witness is entitled if he is asked whether he didn't say something to tell what he did.

The Court: You may tell precisely what you did say.

Mr. Bell: I object to him volunteering any statement and object for the record.

(Testimony of Thomas A. Morgan.)

The Court: Overruled.

A. I told Mr. Lambert to proceed to Barry Arm, land and go ahead with logging operations under the terms of our contract.

Q. (By Mr. Bell): And that was after they had told you that Agostino had blocked them?

A. That is right.

Q. And did you tell them to have the United States Marshal at Anchorage to put Agostino off there? A. That is absolutely wrong.

Q. Did you say anything to them about having the Marshal help you in any way?

A. I may have mentioned to go about our business in a legal fashion and if he threatened our men and blocked us from going in there to get protection to see that our men were not molested.

Q. You have accomplished your purpose in taking over the Barry Arm operations, haven't you?

A. Not in any sense of the word.

Mr. Boochever: Object to that question as immaterial. [356]

The Court: It has been answered.

Q. (By Mr. Bell): You have cut something over 3,000,000 feet of lumber there, haven't you or logs? A. Yes, that is probably right.

Q. And how much more do you anticipate cutting there? A. We hope to get 7 or 8,000,000 more.

Q. And the only method by which you could handle that timber was the landing in Mosquito Creek, wasn't it?

(Testimony of Thomas A. Morgan.)

A. Yes, that is the easiest way although we have used a cove farther down, farther away from Bruno's camp. We have found that very feasible, too.

Q. How far is that from there?

A. Another mile or so. We didn't know at that time. Probably half a mile.

Q. You didn't know about it at that time? You did then want to get in possession at Barry Arm for the purpose of cutting about 10,000,000 feet of logs, is that right?

A. By "possession" what do you mean?

Q. Well, you wanted to get in there and get established, didn't you?

A. We wanted to proceed with our contract, yes.

Q. Now, then, didn't you have that in mind the year before when you sent two men in there timber cruising right up through by Bruno's place, didn't you? [357]

A. An explanation of that, Mr. Rowell and Mr. Lambert went on the timber cruise. Actually they just went around the Point. We were logging at Patton around the Point and we knew about the timber at Barry Arm.

Q. You saw that report, in fact, you did take that report that Rowell and Lambert made?

A. I did, but I didn't need it because I knew personally.

Q. What did you dictate it for?

(Testimony of Thomas A. Morgan.)

A. I did not. I did not see that report until probably sometime in the winter.

Q. Did you have a brother who was formerly associated with you there?

A. He was formerly a mill superintendent at Whittier prior to Mr. Rowell.

Q. His name was George? A. George.

Q. He did dictate that, didn't he?

A. I have no knowledge who dictated that.

Q. Did you send Ted Rowell and Blacky Lambert—were both on your payroll in the fall when they made that timber cruise, weren't they?

A. I believe that is right.

Q. And you sent them up there and after they came back you knew there was an abundance of timber on Mosquito Creek?

A. I did not send them up there. I already knew the timber [358] was there.

Q. Do you know why they were——

A. It is our custom. We cruise timber after the mill closes and before the heavy snows prevent us.

Q. So that you can get it for the next year's operation?

A. We try to plan three years ahead if we can. We do not always succeed.

Q. I believe that report shows this is the best available timber on, I believe it said, Prince William Sound?

A. The northwest corner. Doesn't it specify

(Testimony of Thomas A. Morgan.)

that, because the best timber is over in the Cordova area.

Q. I will ask you if you don't remember this part of this agreement "Close examination proves that these logs could be floated down the slew with a little preliminary work" do you remember that?

A. I received the report. Yes, I recollect that.

Q. You received the report? A. Yes.

Q. Did this mean anything to you "The ground aside from a little soft muskey is gravelly and easily travelled for either cat or truck" did that mean anything to you?

A. Not particularly. I already knew about it, Mr. Bell.

Q. You knew that that particular fact made it inviting to you?

A. I had seen it before and made a cruise of it and checked from an engineering standpoint and already ascertained it could [359] be logged successfully.

Q. Then all you needed after you got Mr. Jacobsen to get the permit for you to cut the timber or timber sale, all you needed then was Bruno Agostino and Socha's site, wasn't it?

A. Except that Mr. Jacobsen had nothing to do with the contract.

Q. Well, I thought he did it. He run the ads and told the jury how he did it and everything and I suppose he was probably telling the truth.

(Testimony of Thomas A. Morgan.)

A. The Regional Office handled it and it went through his hands but it was too big.

Q. So he didn't run the publication?

A. They were put in the Cordova papers as well as others.

Q. The Regional Office is at Juneau, isn't it?

A. Yes.

Q. It was handled at Cordova, wasn't it?

A. Only part of it.

Q. You—all you needed then after you got that timber sale of 10,000,000 feet was the camp site of Bruno Agostino, wasn't it?

A. Not at all. We didn't use it at any time. We had a better camp site than his.

Q. You crossed the creek and made one a little farther up?

A. That was our permanent campsite and still is.

Q. But you did still have to use the mouth of Mosquito Creek [360] for rafting your logs, didn't you? A. Yes, and we still use it, yet.

Q. You saw Grasser twice in September down at Whittier, didn't you?

A. Well, we are getting confused in dates—such a progression of dates that it might require clarification and study a little bit—twice in September, it could have very possibly have lapsed over into October.

Q. You testified that you saw him twice—once in September and he wanted to get you to furnish a tug and a scow or something?

(Testimony of Thomas A. Morgan.)

A. That is right.

Q. And you wouldn't do it at that time?

A. Correct.

Q. Now, then, you said later in September you saw him again there?

A. To be specific, when I say "approximately" I mean in that neighborhood—in that range—that period—close by.

Q. Did you talk to Ray Grasser at any place else between July of 1948 and October 1948?

A. Other than the two times I saw him at Whittier, you mean?

Q. Yes. A. I don't recall.

Q. Did you send him any telegrams or letters during that time?

A. I don't recall. I might have done so.

Q. Did you have any telephone conversations with him? [361]

A. It seems to me that now that you have brought it up that he did call there once before coming down, but the contents—the text of the message—is not clear to me, because what he had in mind we were not interested in, if it was a proposal. It might have been a proposal on these barges and boats which were terminated very shortly.

Q. He did go down there early in September with the intention of using your boat and barges to bring out of there the caterpillars and the donkey engine and you stopped that, is that right?

(Testimony of Thomas A. Morgan.)

A. That was his proposal.

Q. Now, do you have any idea why he came to you to get you to furnish the boat and barge to bring them out?

A. I have an idea that he knew at that time that the contract had not been completed by Mr. Bruno. We had no further interest in them.

Q. And your thought of it is that he knew that you and Bruno were fussing over the contract and that he thought you would furnish the barge and boat to remove part of this equipment, is that what your idea was?

A. He must have known that we were through conclusively because certainly we would not have released them to him otherwise.

Q. Why do you say you would not have released them to him otherwise?

A. Had we been involved in the matter and our attorney had [362] not informed us that the contract could not be completed, why we would certainly have been responsible.

Q. You were in possession of them there?

A. Not at that time; they had been returned.

Q. You had the whole and sole possession of the entrance of Mosquito Creek all in there?

A. That is not correct. There is lots of room there, plenty of room for two or three operators.

Q. To operate on the bank, is that right?

A. Not on the bank. There is a big slew and that

(Testimony of Thomas A. Morgan.)

pond you refer to.

Q. That slew was 20 foot wide, I believe Mr. Jacobsen said.

A. He said the creek, when the tide was out it was 20 feet.

Q. And there was lots of room for other people?

A. When the tide is in we do our rafting. You could to——

Q. Do you have any other explanations to make to this jury why this fellow, Ray Grasser, was down there to meet you twice and why this equipment disappeared? Do you know any other reason why it would have happened other than to help you out of the trouble you were in?

A. He did not come to me twice. He did come, as I mentioned before, the second time to merely pass through. I saw him get on the boat and leave in the direction of Barry Arm.

Q. But you happened to be at Whittier both times? A. That is right. [363]

Q. And you are a very busy man and travelling all the time?

A. I might explain that during that time Mr. Rowell took an interest in another sawmill outside and until I could secure relief I was stationed there in September and I was very closely confined to that particular unit at that time.

Q. Do you know where they went—where the caterpillars and the donkey engine went to?

A. No, I have been curious. I have never heard.

(Testimony of Thomas A. Morgan.)

I would like to know.

Q. You don't have the slightest idea in the world where they are today, do you?

A. That is absolutely correct.

Q. And you are just as positive about that as other things you have testified to? A. Right.

Q. You do know that this suit was filed against you and you were served with summons when it was filed? A. That is right.

Q. You do know that more than a month prior to the time the suit was filed that you and Bruno were at outs over this matter, don't you?

A. By "outs" I don't know what you mean. I did know a month before the suit was filed that Bruno would not comply with his part of the contract and that there was no contract and that we had returned the tractors—put them back—and terminated the deal completely. [364]

Q. Now, you took the tractors over there and you didn't do any work on them, you didn't put any equipment on them, because the equipment that you ordered was for a D.R. and not a D.R. 8, isn't that correct?

A. No, that is not right. We possibly got some parts that were wrong but a lot of them were finally secured. It was an old, obsolete model.

Q. And you got them all—the correct amount?

A. They came in over a period of time and a lot of them are still on there, if you can find the tractors, because they were put on there.

(Testimony of Thomas A. Morgan.)

Q. They were put on by you or your men?

A. By our two mechanics under the direction of our foreman.

Q. And you think they were still on there when the caterpillars and the donkey disappeared?

A. I was so informed.

Q. Now, what is this other equipment that you have down there that you ordered?

A. I am not sure of the specific items. They were left in Bruno's shop but as I recall there were a lot of rollers that came in during even early September and were taken out there even though we had returned the tractors and knew the deal would not be completed.

Q. Do you know Mr. Brown of the Elemar Packing Company? A. Yes. [365]

Q. Is he a close friend of yours?

A. No, only an acquaintance. We do business with Elemar Packing. He comes over and buys some lumber.

Q. Did you see him along in September of 1948?

A. I am under the impression that it was a little earlier than that, possibly August.

Q. August or September, then?

A. Possibly August.

Q. Did you see him about the same time that Grasser—Ray Grasser—came down there to come to your place?

A. I don't remember that, don't remember seeing him again.

(Testimony of Thomas A. Morgan.)

Q. There wasn't anyone with Grasser when he came, was there?

A. He could have been on the boat but I don't recall seeing him ashore. On the Mahina Oho who came over from Cordova.

Q. Who runs that boat?

A. It is owned by Alaska Allied Industry and operated by them with Jack Bowers at that time was the Captain.

Q. Who is the Alaska Allied Industries? Who is the person that is the principal owner?

A. Bowers is also the manager. It is a group of G.I.'s who came over from Honolulu in about 1947 and started this operation there. They conduct salvage operations and do a little bit of logging and towing and so forth.

Q. Did they ever log or tow for you any?

A. Yes, they did get out a few logs. [366]

Q. In 1948?

A. They produced some logs but the one raft they turned out was not delivered—yes, it was, it was delivered just the other day.

Q. I believe you stated that the R.D. 7 caterpillar was basically sound. Did you ever hear it run? A. I did.

Q. Did you see it operate?

A. I saw the boys turning it over and trying it out probably sometime in August up in our shop.

Q. Now, what would a big 8 caterpillar weigh?

A. I believe the weight of that particular ma-

(Testimony of Thomas A. Morgan.)

chine is in excess of 20,000, probably 22 or 23 without the accessories. Put on the blade and the towing winch it would be about that.

Q. What do they sell for now, what would a D.R. cat of similar size sell for now?

Mr. Boochever: Object to that as irrelevant.

The Court: Overruled.

A. I believe the new 8-R.B., eighteen thousand.

Q. Well, that is without the blade and the other attachments, isn't it?

A. I had reference to a logging unit which would include the blade and the drum.

Q. Eighteen thousand for a D-8?

A. But you are not comparing a new one with that machine?

Q. I am just asking what a new one would cost, is that right? [367] A. Approximately there.

Q. Here in Alaska for that price?

A. The latest prices would have to be checked because we haven't bought a machine for several years. We have bought a number of——

Q. What does an R.D. 7 sell for now?

A. As I recall it we bought one last year and as I recall the price at that time was about sixteen thousand in Seattle which would make it about, oh, about six or eight-hundred more up here.

Q. Approximately $17,000 delivered here?

A. Approximately. Therefore an 8 might be worth a little bit more.

Q. The facts are that a D.R. sells for $22,750 in

(Testimony of Thomas A. Morgan.)

Anchorage, is the price delivered in Anchorage, isn't it? A. It would be—it could be.

Q. I believe you stated that neither one of these caterpillar tractors had blades?

A. That is right.

Q. Neither, there was no blade there at all?

A. If you are referring to the old, home-made blade that was broken and cast aside by the shop, I will qualify it. It could not be used and was not so equipped.

Q. Did you put blades on them?

A. We didn't have the opportunity. We didn't get past the [368] engine. We just started to tear them down and work on them.

Q. You didn't put any equipment on them outside of some repairs?

A. They started to work on the tracks, the rollers and so forth, brackets and a few track links and pins and things like that.

Q. You are sure, though, that there was no blade on either one of those caterpillars? You inspected them to see?

A. There was none when I saw them. This old D-8 blade was there but it had been broken and it was a home-made blade and could not be used.

Q. So far as you know it was never put on the caterpillar? A. That is correct.

Q. Do you remember talking to Bruno, Agostino and Mr. Blacky Lambert that day on the 10th day of April, 1948, at Barry Arm camp about the little

(Testimony of Thomas A. Morgan.)

ten by fourteen or ten by twelve cabin that Bruno always claimed as his own cabin, do you remember that being discussed there?

A. Nothing about this specific cabin. I remember talking about the equipment and various pieces of machinery.

Q. Just to refresh your memory did you say this or this in substance to Bruno Agostino in the presence of Mr. Lambert that you didn't want that little cabin; that he could keep that; that you didn't care anything about it?

A. I told him that I didn't want any part of his equipment or [369] buildings.

Q. Answer the question, please. Did you tell him that about the little cabin? A. I did not.

Q. You did not. Was the little cabin mentioned in the conversation there that day?

A. Not to my knowledge.

Q. Well, you didn't tell them that you didn't want any part of it when you already had it, did you? You didn't tell them that there?

A. I don't understand your line of reasoning, Mr. Bell.

Q. You were in possession of everything, your men were there, and they were cutting logs and the works was going on, you didn't tell Bruno "You are blind, I haven't got this——".

Mr. Boochever: I object to counsel making a speech here.

The Court: Objection is sustained.

(Testimony of Thomas A. Morgan.)

Mr. Bell: Exception.

Q. Did you tell Bruno that or that in substance?

A. We were in possession of our own logging area—our camp—on the other side of Mosquito Creek. We had nothing whatever to do with Bruno's camp. We were in possession of nothing that belonged to him.

Q. Where was Bruno that day that you were talking?

A. Sitting on a log, as I recall, on the beach.

Q. Near his camp house? [370]

A. Not far away, 100 yards, perhaps.

Q. And the landing beach—the air landing strip —is in front of his place?

A. No, there is no strip; it is just a beach.

Q. And that is the only place you can land there?

A. No, no I wouldn't say that it is just like any other beach, there is other areas, other places.

Q. There is some over around over by Cordova, is there?

A. All around Prince William Sound.

Q. You had already moved in, unloaded your bunkhouses, unloaded your barges and had your men working when you were talking to Bruno on the 10th, weren't you? A. Yes, in our area.

Q. And that was what you wanted was to get in and get possession, wasn't it?

A. Not possession of his camp.

Q. You wanted possession there so that you could operate, didn't you?

(Testimony of Thomas A. Morgan.)

Mr. Davis: Your Honor, I think it might be a good idea at this time to have counsel state what he means by "possession"?

The Court: Objection is sustained.

Mr. Bell: Exception.

Q. Why did you agree to furnish Blacky Lambert two caterpillars and testify awhile ago that one was all that was needed?

A. If you can call a discussion an agreement perhaps you would [371] have figured it out that way, but I did not agree. We had discussed the progression of our logging operation for the season. We bought one new unit because we were not through at King's Bay where we had two other D-7's that would be finished in the middle of the summer. And I said then if there yardage progressed that they had logs cold-decked ahead of the yardage we would shift another machine into that area.

Q. When did you receive your papers showing the timber sales to you or to your company in that area from the Forestry Department?

A. Mr. Bell, I can't tell you the exact date, it was fairly early in the year.

Q. Was it in March?

A. Seemed like the bids were opened in February. The contract might not have been signed by the Forest Service. Sometimes there is quite a delay. If Mr. Hansen and Mr. Berbick are away it could easily have been a month after that, but we

(Testimony of Thomas A. Morgan.)
are notified of acceptance when our bids are received and they are opened.

Q. You stated you sent a telegram to Lambert. What date did you send that?

A. I would say approximately the first of April, thereabouts, after I returned to Juneau and talked with the Forest Service pertaining to our contract and rights to Barry Arm.

Q. To refresh your memory, wasn't that the 23rd of March that [372] you sent the telegram?

Mr. Davis: Your Honor, if he has a telegram possibly he ought to show it.

The Court: Yes, if you have a telegram.

Q. (By Mr. Bell): Do you know where the telegram is, Mr. Morgan? A. No, I do not.

Q. You did have it in your possession, didn't you? A. The telegram I sent?

Q. Yes—no, after it was received by your employees—Lambert and Rowell.

A. I have never seen it.

Q. You have never seen that since?

A. Not to my knowledge.

Q. Do you know where it is? A. I do not.

Q. You know that it was shown to Bruno Agostino by Ted? A. I was told that it was.

Q. And you don't know where it is today?

A. I do not.

Q. You do keep all those records, don't you?

A. We try to but I tried to find that message so I assume that you have it.

(Testimony of Thomas A. Morgan.)

Q. And you know that Lambert testified that he showed it to Bruno and that Bruno gave it back to him and that he took it [373] back to Whittier, you heard that testimony of Lambert's didn't you?

A. I believe that something to that effect——

Q. Have you made any effort since that time to get it from Whittier up here?

A. I certainly have; in fact I thought Mr. Rowell had it and he would testify and he claimed that they did take it to Barry Arm and where it was put subsequently we don't know, but maybe the Signal Corps would have a copy of it.

Q. Do you know where it was sent from?

A. Well, it may be that I sent a message from Seattle as well as from Juneau. As I recall I sent one from Juneau after I returned and I am not sure about sending one to Seattle.

Q. And did you send that to Whittier?

A. That is right.

Q. And you addressed it to whom?

A. I am——

Mr. Boochever: Some time ago the objection was made that if the counsel is questioning the witness about some telegram he should show it to the witness. I believe Your Honor has sustained that.

Mr. Bell: Of course we don't have it or we wouldn't be trying to get it. We don't have it at all.

Mr. Boochever: That is very well, then, Your Honor.

(Testimony of Thomas A. Morgan.)

Mr. Bell: I ask counsel for defendant to deliver the telegram. [374]

Mr. Boochever: We do not have the telegram. We have made every effort to locate and cannot locate that telegram. We assumed that Mr. Lambert still had it.

Q. (By Mr. Bell): Don't you remember where you were when you sent that telegram?

A. I send telegrams every day, possibly half to different places. I might have sent a telegram to Mr. Lambert or Mr. Rowell the day after receiving the telephone call because I remember being very much upset as to what was taking place up there. I do remember sending the telegram from Juneau after I talked to the official of the Forest Service as to our position and rights at Barry Arm.

Q. You never did send a telegram to Bruno, did you? A. No.

Q. And you never sent one to Mr. Socha at any time?

A. I wouldn't say at any time because I have been dealing with these boys for several years.

Q. I mean at any time during the month of March or April, 1948.

A. It doesn't occur to me that I did. I have no record of such a telegram.

Q. Did you know anything about a telegram coming to Mr. Agostino about his timber permit and coming and being in your [375] office there in Whittier and later brought out and delivered to Bruno

(Testimony of Thomas A. Morgan.)

Agostino? I believe the telegram would be addressed to Agostino.

A. Supposed to have been sent by me?

Q. No, sent by the Forestry Department or possibly from Juneau any way?

A. No, I don't know about that.

Q. Never saw that telegram?

A. Never heard about it.

The Court: Any further direct examination?

(No response.)

Any juror may ask a question if he desires. The witness will not answer until I have a chance to rule upon it.

Juror: No. 6: If it is proper could he tell us if the six barrels of oil and the barrel of gasoline been returned, does he know?

The Court: He may answer, if he knows anything about it.

The Witness: Your Honor, I am not too sure. In our contract with Mr. Lambert, it provided for him——

Mr. Bell: I object to him making a speech.

The Court: Overruled.

The Witness: He is to supply—he is to pay for all his supplies—gas, oil.

Mr. Bell: I object to him making another speech, Your Honor, and ask that he answer the question. [376]

The Court: Overruled.

Mr. Bell: Exception.

(Testimony of Thomas A. Morgan.)

The Witness: He sends his requisition to us and we fill them for him. Whether he returned that six barrels of oil I do not know. Ordinarily he would.

The Court: Any other questions?

Q. (By Mr. Bell): Do you remember, Mr. Morgan, meeting Mr. Ross in the office of McCarrey in Anchorage?

A. I believe I do remember. We had a brief meeting there sometime in the fall.

Q. And that was for the purpose of discussing this case?

A. Whether Mr. Ross was there during one of the numerous visits when I called at Mr. McCarrey's office I am not in a position to say.

Q. He didn't make enough of an impression on you as to whether he was there or not?

A. He is big enough, but——

Q. Do you remember that that was the occasion for the meeting was to discuss a settlement of this matter before suit was filed?

A. Well, it would have been dismissed from my mind. Such a settlement never needed to be discussed about the case.

Q. I will ask you if you didn't tell Mr. Ross then that you had signed this contract? [377]

A. Well, if it came up in the discussion I certainly would have told him so, that is right.

Q. And you didn't show him the contract or give it to him or anything but you did tell him that you had signed it?

(Testimony of Thomas A. Morgan.)

A. Mr. McCarrey had it, he may have shown him.

Q. I am not asking him; what did you—did you tell Mr. Ross that you had signed it then?

A. I don't recall personally having mentioned it.

Q. You don't? A. No.

Q. Do you remember whether you showed it to him or not or anything like that?

A. No, Mr. Bell. That is something I assumed that he knew all about. Mr. McCarrey had represented us throughout.

Q. And you were there on purpose to meet—. Was Mr. Agostino up there?

A. I don't recall having seen him during that period.

Q. Was George Grigsby there?

A. Well, people came and left regularly.

Q. Was George Grigsby with Mr. Ross in meeting you?

A. Now that you mention it, I believe he was.

Q. And you can remember that you did see Mr. Grigsby there?

A. Yes, I believe that George Grigsby was there. I know him well and I remember now he was there briefly but as I recall left quickly—left after a short time. [378]

Q. Was that before or after this suit was filed?

A. That I am unable to say because I don't have the date handy.

Q. Can you give us approximately the date that you met there?

(Testimony of Thomas A. Morgan.)

A. Well, it was sometime, I would say, in the early fall.

Q. Do you remember the purpose of these gentlemen coming up there and meeting you at your attorney's office? Do you remember why you met there?

A. Possibly they had that in mind and Mr. McCarrey had asked them to come over, I don't know for sure, because I remember going from the train to the office because Mr. McCarrey had told me on the 'phone he had several things he wanted to go over with me.

Q. You came from Whittier up here to discuss the settlement with the Agostino attorneys, didn't you?

A. I was en route to Juneau. I usually call at our attorney's office and yard.

Q. Do you know whether that is right or not? Didn't Mr. McCarrey call you down at Whittier and you came up on the train for the purpose of meeting these men and for the purpose of seeing if a settlement could be made?

A. I remember the telephone call and I remember going there. To my way of thinking it was not specifically to see these gentlemen or to work out a settlement.

Q. You never paid them any money there, did you? [379]

Mr. Boochever: I think he should let the witness answer the last question—complete it. The witness was still talking.

(Testimony of Thomas A. Morgan.)

Mr. Bell: I am sorry. Is there something more you want to say about it, Mr. Morgan?

A. No, you may proceed, Mr. Bell.

Q. You didn't pay any money for Bruno Agostino there, did you? A. No.

Q. You didn't offer to pay any? A. No.

Mr. Bell: That is all.

The Court: Counsel for defendant may re-examine.

Redirect Examination

By Mr. Boochever:

Q. Now, Mr. Morgan, there was considerable discussion by Mr. Bell with you about Mr. Butcher, when you saw him, Mr. Agostino, and at the time this contract which was later reduced to writing was drawn up. Now at that time did Mr. Butcher represent you as your attorney?

A. No not at all.

Q. Whom did he represent?

A. Mr. Agostino.

Q. And did Mr. Butcher at any subsequent time ever represent you as your attorney? [380]

A. No.

Q. Has he ever represented you as your attorney? A. Not to my knowledge.

Q. And does he represent you as your attorney now? A. No.

Q. During all of these proceedings did he at any time represent you? A. No.

Q. Now during that period of time was Mr.

(Testimony of Thomas A. Morgan.)

Butcher to your knowledge aware of the fact that Mr. McCarrey was your attorney?

A. He was.

Q. Now I believe Mr. Bell in referring to your April conversation with Mr. Agostino ask one question something to the effect did you know that you had a R. D. 7 and R. D. 8 near there and you say—I don't remember your exact answer—"Yes there was one near there." Did you mean that was your R. D. 7 and R. D. 8 or not?

A. If the question was asked and answered that way of course it was obviously wrong because I mentioned we were close to Bruno's camp. His tractors were there. Our tractor which had been landed was probably close to a mile away. They were undoubted his tractors that I was referring to.

Q. Now he asked you if you ever notified Bruno or anyone representing him that you had signed these checks before the [381] suit was filed. Now, do you recall ever having notified him or his attorney?

A. Well, of course, we notified his attorney. We have a letter proving that.

Q. I ask you to read to the jury from the letter of July 19th, 1948 what you wrote to Mr. Harold Butcher and testify that you mailed to him—the next to the last paragraph.

A. "I have signed a check in the sum of $3300 and left it with Mr. C. B. Summers with instructions to pay it to the Clerk of the Court upon

(Testimony of Thomas A. Morgan.)
your giving him an acceptable list of all of the personal property which Columbia Lumber is to get under the contract."

Q. And that letter was sent to Mr. Butcher?

A. That is right.

Q. Now, is it possible for two logging outfits to operate logging camps in the vicinity of the mouth of Mosquito Creek?

A. Apparently there is still a misunderstanding of the situation there. The answer basically is yes. I could explain it more in detail if you have the time and wanted me to.

Q. Well, explain what you mean by two outfits could operate there?

A. Mosquito Creek meanders down the valley and about a quarter of a mile up it enters a slew and a large area that is flooded at high tide. When the tide comes in it is like a big lake. There is an immense area covered by water to the extent of, [382] perhaps, 7-8 or 10 feet, so probably 12 to 15 rafts could be stored in there and two or more operations could boom logs successfully and during the rushing of the tide we don't boom anyway. It has to be rafted at high tide and almost on slack water because the currents are too strong. So operators could store their logs in booms along that slew at high tide.

Q. Did you have any need of Agostino and Socha's camp in the spring of 1948 or at any time?

(Testimony of Thomas A. Morgan.)

Mr. Bell: I object to that as a conclusion, just a conclusion of the witness.

The Court: I think it is proper. Overruled.

Mr. Bell: Exception.

A. We did not.

Q. (By Mr. Boochever): Now, Mr. Bell asked you some questions about Mr. Grasser in regard to his taking away his tractor and donkey. Did you ever call Mr. Grasser, get in touch with him or in any manner ask him to take away that tractor and donkey? A. Absolutely not.

Q. Did you in any way cooperate with him in taking away the tractor and donkey?

A. Certainly not.

Q. Now, in regard to the Elemar Packing Company, did you in any way induce or attempt to get them to take away their tractor? [383]

A. I did not.

Q. Did you in any way cooperate with them in getting away their tractor? The way they claim? A. I did not.

Q. You stated that during the period you had the two tractors that you repaired them. Where were some of the parts purchased that went into those tractors?

A. Principally from the Northern Commercial Company.

Q. Now, there was some testimony in regard to the value of a D-8 tractor and the value of a D-7 tractor new at this time. I believe you testified

(Testimony of Thomas A. Morgan.)

you thought it was about $18,000 and Mr. Bell testified that it was about $22,000 for a D-8 and that a D-7 was at the value of about $16,000. Now, how do those values compare with the tractors which Bruno had at the camp in the spring of 1948?

A. Well, it would be like comparing a Model T Ford with a new streamline convertible. The values are nowhere comparable. Their cat was over ten years old. Ours was, of course, a brand new machine.

Q. Now, in regard to the values of their cats, do you know what the normal life of a cat according to the depreciation schedules figured out by the Internal Revenue Bureau is?

Mr. Bell: I object to that. It would not be controlling here.

The Court: Objection is sustained. Internal Revenue [384] Bureau may have a formula all their own.

Q. (By Mr. Boochever): What is the normal depreciation—the normal life of a tractor figured as far as depreciation is concerned?

Mr. Bell: I object to that for the reason he has not shown himself qualified to testify on that line.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Do you know what a normal life of a D-8 or D-7 caterpillar tractor is?

Mr. Bell: He hasn't qualified for answering that question.

(Testimony of Thomas A. Morgan.)

The Court: I think anybody might learn that. Overruled.

A. That would require qualifying. It would depend almost entirely upon the upkeep and the work being performed. Would you mind giving me that question again?

Q. (By Mr. Boochever): Do you know what the normal life of a caterpillar tractor is as figured on a depreciation schedule?

The Court: Wait a minute. I think counsel had better specify whether the cat is in storage all the day or whether it is used and if used how it is used.

Mr. Boochever: Thank you, Your Honor.

Q. Used in logging operations in Alaska?

Mr. Bell: Object to that. There is no showing how the caterpillars here were used or anything about their former use [385] or whether they were used at all.

The Court: Overruled.

Mr. Bell: Exception.

A. Five years.

Mr. Boochever: No further questions, Your Honor.

Mr. Bell: I have some now since he has gone into another field.

Mr. Boochever: I object to counsel's remarks, Your Honor.

The Court: Overruled.

(Testimony of Thomas A. Morgan.)

Recross-Examination

By Mr. Bell:

Q. Now, Mr. Morgan, the life of a caterpillar would depend a good deal on the use and the kind of use it had?

A. I agree, Mr. Bell, it depends a lot on the up-keep. We write ours off after five years.

Q. You do that for income tax purposes?

A. And for the reason that at that time their——

Q. What do you do with them at the end of five years?

A. We dispose of them as best we can.

Q. Sell them as second-hand caterpillars?

A. Not always. One camp I might state, we are using one as a double-drum unit. We mounted a double drum on the back end of it, using the motor only.

Q. How old a cat is that one?

A. I think that one has gone into about its sixth or seventh year. [386]

Q. That was used about five years extensively in the timber woods?

A. Four or five and since then it has been used to handle this double drum but not in the woods.

Q. What is this double drum used for?

A. For bringing in logs from isolated points where the tractors can't reach out and sometimes in yarding to a spar tree.

Q. It is still in use then, of course?

(Testimony of Thomas A. Morgan.)

A. To a reasonable extent.

Q. How old a cat have you ever seen in use?

A. Well, I have seen one of Mr. Bruno's tractors operate and it is over ten years. I know that. That is about the oldest I have seen.

Q. Do you know it is over ten years? How do you know? A. I was informed.

Q. Someone told you that?

A. No, someone in authority.

Q. Who was it told you that?

A. Mr. Wynn Irvin of the Northern Commercial Company.

Q. And he told you that Bruno Agostino's Caterpillar down there at Barry Arm was over ten years old? A. That was what I was informed.

Mr. Bell: I move to strike his answer because it shows now that it is not competent.

The Court: Overruled. [387]

Q. (By Mr. Bell): You stated to your attorney that you didn't request Elemar Packing Company or Ray Grasser either to take any of that equipment out, that is right, is it?

A. That is correct.

Q. You said awhile ago that you knew Grasser was going in there to get the equipment because he propositioned you to use your equipment to get it? A. Right, you are.

Q. And you didn't do anything to stop him, did you?

A. I had no authority. I was informed I had none.

(Testimony of Thomas A. Morgan.)

Q. Now you told this gentleman that you never did in 1948 need Bruno Agostino's camp at all. Why were you so perturbed, I believe is the word you used, when these gentlemen called you on the 'phone down in Seattle, Washington and told you that Bruno wouldn't let them in there if you didn't need that? Why were you so perturbed, can you explain that?

A. If you don't know, Mr. Bell, I think it is the normal reaction of any man when he has a perfect right under a contract to accomplish a certain purpose and a man by force tries to keep him from doing that, I think any man would resent it.

Q. Why did you make some deal to land if you had a perfect right?

A. We made no deal, Mr. Lambert proceeded into the area in which he was entitled to. [388]

Q. Why did you tell Mr. Lambert and Mr. Rowell to go and tell Bruno Agostino that you would be up on the 10th and settle with him or make some deal with him? Why did you tell them to do that?

A. Apparently the word "settle" has bothered us. There admittedly was a dispute. He kept us out of the area we wanted to go in and go about our business. I wired them I would come up but I don't recall using the word "settle."

Q. Why did you send them down there—send to tell them that, if Bruno didn't have any prior rights, you didn't need to, did you?

(Testimony of Thomas A. Morgan.)

A. I told them to take word from the Forest Service on our contract to show him that we had a right and possibly further to tell him that I would be up to see what his contention was.

Q. You didn't have any intentions of paying Bruno on the 10th?

A. I had the remotest idea that there would be a deal. I mentioned before we had no use for his equipment or his camp, everything had been arranged prior to that where we could go ahead with our crew.

Q. Who was it, do you think, that caused Mr. Lambert to believe that it was your intentions to buy Bruno out for the price that he had asked? Do you know how he came by that opinion?

A. It could only be an assumption on his part because nothing was stated to that effect or inferred.

Q. How long did he talk to you on the 'phone?

A. I don't know.

Q. Did you hear him testify that you told him to go on up there, that he told you the price Bruno wanted and you told him to go on up there and take over and tell Bruno that he would be there on the 10th and settle with him, you heard Lambert testify to that?

A. I heard testimony similar to that.

Q. Do you know how Lambert came to think you said that, did you say anything like that?

A. Mr. Lambert to my knowledge testified noth-

(Testimony of Thomas A. Morgan.)

ing of the fact, in fact, he later testified that there was no deal.

Q. And he explained that in his last the reason he said that there was no sale that you didn't explain, isn't that what he explained?

A. Not to my knowledge.

Q. But you just now stated that Lambert later testified that there was no sale. You testified to that, didn't you just now? A. Testified—?

Q. That Lambert testified that there wasn't a sale, you just now testified to that, didn't you?

Mr. Davis: Your Honor, I think that the matter of what Lambert testified to or what he didn't is known by the jury and I don't think we should go at this time into what Mr. Lambert?

The Court: This question may be answered.

A. I was trying to recall what was said. It was confusing [390] what had been said. The actual testimony in detail would have to be read to refresh me exactly as to the words used.

Q. You did hear Mr. Lambert testify yesterday or day before yesterday that what he meant by no sale was that you didn't pay for the——

Mr. Boochever: Now, Your Honor, I wish to object again on the same grounds as Mr. Davis.

The Court: Sustained.

Mr. Bell: Exception.

Q. These caterpillars, they can be reconditioned and be put in pretty good order, can't they?

A. An old tractor can be rebuilt to an extent.

(Testimony of Thomas A. Morgan.)

Q. And they are rebuilt quite often, aren't they?

A. Occasionally, if you want to spend enough on them.

Q. You were willing to spend $2,000 on putting those two caterpillars in, as Lambert said, first-class condition, you were willing to do that, weren't you?

Mr. Boochever: I object to the reference "Lambert said" as calling—as including a double question.

The Court: Sustained.

Q. (By Mr. Bell): You were willing to spend $2,000 to recondition them, weren't you?

A. Under the terms of our agreement if we had kept the machines, if the deal had been completed, we would have spent considerably [391] more than that.

Q. You claim you did spend some money on them? A. That is right.

Q. Do you know how much you spent?

A. Approximately the figure mentioned.

Q. And you don't know how much it was, then? Just approximately?

A. That is as nearly as we could determine it from the parts purchased and the time spent in working.

Q. And you testified yesterday that the parts were still there and they didn't fit the tractor?

(Testimony of Thomas A. Morgan.)

A. I was told that some of them were still there.

Mr. Bell: I think that is all, Your Honor.

Mr. Boochever: That is all, Your Honor.

The Court: That is all.

(Witness excused.)

The Court: Another witness may be called.

CRENDA ANTON

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, please?

A. Crenda Anton.

Q. Mrs. Anton, by whom are you employed?

A. J. L. McCarrey, Jr.

Q. What is your occupation?

A. Attorney at law.

Q. For how long have you been employed by Mr. McCarrey?

A. Since February of this year.

Q. Where is Mr. McCarrey now?

A. He is in Washington, D. C.

Q. And who is in charge of his office?

A. I am.

Q. Who is in charge of the records in his office?

A. I am, too.

Q. Have I made a previous request when I first came to town here to ask you if you knew of any

(Testimony of Crenda Anton.)
checks made by Columbia Lumber Company to the Clerk of the Court or to Mr. Bruno Agostino?

A. Yes, you did ask me.

Q. Do you know where they were?

A. No, I didn't.

Q. What did you do, if anything, about it?

A. I told you that I would check the file and see if I could locate the checks, which I did, and I was unable to find them so I sent a wire to Mr. McCarrey.

Mr. Bell: Now, object to the correspondence or content of any conversation between she and Mr. McCarrey, it would not be binding on these plaintiffs unless they were present. [393]

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Continue with your answer, please?

A. I wired Mr. McCarrey and told him that Mr. Boochever had asked me for some checks from Columbia Lumber and asked him where they were and he wired me——

Mr. Bell: Now, Your Honor, I object again. I hate to stop it but the telegram would be the best evidence, if admissible at all, and this is a conversation between a stenographer and her boss and it wouldn't be binding on Mr. Agostino and Mr. Socha at all. They weren't present.

Mr. Boochever: Possibly I could reword that last question, Your Honor.

(Testimony of Crenda Anton.)

The Court: All right.

Q. (By Mr. Boochever): As a result of the wire from Mr. McCarrey were you able to locate the checks? A. Yes.

Q. Do you have them with you now?

A. Yes, I do.

Q. Were they in a file in your office?

A. Yes.

Q. May I see the checks? A. Yes. [394]

Mr. Boochever: At this time would you mark these for identification, please, as Defendant's Exhibits—they would be Defendant's would they not?

The Court: H, I, and J.

Mr. Boochever: I offer these checks in evidence as Defendant's Exhibits H, I, and J.

Mr. Bell: I object to their admission for they have never been identified by anyone yet and I object to their admission for several reasons, one, it would be a self-serving declaration; and, second, that it is incompetent, irrelevant and immaterial, no proper foundation laid and not within the issues.

The Court: The first objection is good, because they haven't been identified as being anybody's checks.

Mr. Boochever: Your Honor, we request that they be admitted subject to further identification.

Mr. Bell: We object to that.

The Court: In the face of objection I think you had better identify them before having them admitted. You may conclude your examination.

(Testimony of Crenda Anton.)

Mr. Boochever: There are no further questions to ask of this witness.

The Court: Counsel for plaintiffs may examine.

Cross-Examination

By Mr. Bell:

Q. When did you find those checks? [395]

A. I wired Mr. McCarrey——

Q. When did you find the checks physically?

A. Wednesday.

Q. Wednesday of this week? A. Yes.

Q. You had never seen them before that?

A. I had never seen them before.

Mr. Bell: That is all.

The Court: That is all, Mr. Anton, you may be excused from further service unless you are sent for.

(Witness excused.)

HAROLD J. BUTCHER

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, sir?

A. Harold J. Butcher.

Q. What is your occupation?

A. I am an attorney at law.

Q. Where do you practice?

(Testimony of Harold J. Butcher.)

A. Anchorage.

Q. Calling your attention to the month of June, 1948, were you the attorney for Bruno Agostino during that month?

A. Yes, I was retained by Mr. Agostino. [397]

Q. Did you represent him in regard to some property at Barry Arm?

A. If that is the property in Prince William Sound, yes.

Q. In that connection what action did you take with Mr. Bruno, what was the first thing you did for him in regard to that property?

A. Mr. Agostino came in and told me to some extent his difficulties with the Columbia Lumber Company and with the operations at Barry Arm and that he felt that the company was trespassing on his property and wanted me to start an action against them. I did as all attorneys do, I examined the facts as well as I could with the view of determining whether there was a good cause of action.

Mr. Bell: That is as far as would be permitted, Your Honor, because a conclusion of an attorney would be a confidential relationship between he and his client and we as attorneys for Mr. Agostino object to him testifying to any confidential relations between attorney and client.

The Court: Well, of course, that rule is well

(Testimony of Harold J. Butcher.)

known. I understand counsel has no objection to what already has been testified?

Mr. Bell: No, not a bit to that. I would have no objection to him testifying to the physical things that he did but the confidential relations between the two would certainly—I would object to that.

Mr. Boochever: We don't want any confidential communications, Your Honor, and, of course, we have never sought to inquire of them.

The Witness: If I may say so, I did not intend to reveal any confidential determinations on my part, just what I did.

Q. (By Mr. Boochever): What did you do?

A. As I said, I had examined the facts. I determined that the best——

Mr. Bell: I object to what he determined. That is the confidential relations between attorney and client.

The Court: Whether it is or not it is objectionable and the objection is sustained.

Q. (By Mr. Boochever): What did you do?

A. I called Mr. Tom Morgan at Juneau.

Q. Prior to that time did you make an investigation of the premises themselves that were in dispute?

A. Yes, I went with Mr. Agostino. He retained a commercial airplane here at Anchorage and we flew to Barry Arm where I covered the property with him to some extent from the beach back into the wooded area.

(Testimony of Harold J. Butcher.)

Q. When was that?

A. To my best recollection it was the last part of May or the early part of June, 1948. [399]

Q. Were the caterpillar tractors claimed by Mr. Agostino on the property at that time?

A. Yes, they were.

Q. Where were they?

A. If I remember correctly there were two sheds or buildings and there was a tractor in each shed. One of the sheds, the buildings I call a shed, might have been a lean-to, but it is my recollection that it was an enclosed building.

Q. Were any men from Columbia Lumber Company in the buildings of Mr. Agostino at that time or in the immediate vicinity of those buildings?

A. When we landed at the beach there was no one at all on the beach except Mr. Agostino and myself and Mr. Christianson, the pilot, and after going into the buildings and looking around and examining various pieces of equipment, Mr. Agostino suggested that we follow a road which led along the beach about a half—a quarter of a mile and then turned sharply left and then went up along a creek perhaps a half mile, climbing slightly upward to a point where there was a stream and some cutting going on and at the right of the stream was a camp consisting of a number of buildings?

Q. And were there men there in that camp?

A. There were quite a number of men, I believe it was the dinner hour and the evening hour, I

(Testimony of Harold J. Butcher.)
should say, supper hour, in the camp and men were going to and from the messhall and [400] the various smaller buildings.

Q. There weren't men going to and from Mr. Agostino's buildings or were there any men there?

A. Unless those buildings to the right of the stream were Mr. Agostino's there were not. I don't know whether they were or not. The buildings I saw the men going to and from were a bunch of similar buildings to the right of this stream, we had to cross a stream on a narrow log, quite difficult to cross.

Q. By the right of the stream, do you mean the right going upstream?

A. Looking up the valley, up the creek, it would be to the right.

Q. And that was how far up, did you say, up the stream approximately?

A. A half mile I would think.

Q. Did you take a picture or pictures on that occasion?

A. I took quite a number of pictures. I had forgotten to bring my own Kodak, which I had planned to bring, and Mr. Agostino had a small Kodak which he had films for and I took maybe twenty or thirty pictures in the area from his buildings and the beach on up to this other area that I have referred to.

Q. Did Mr. Agostino take any pictures?

A. No. As I recall I took all the pictures. I

(Testimony of Harold J. Butcher.)

loaded the camera and snapped the pictures. [401]

Q. I show you a picture marked Plaintiffs Exhibit No. 4 and ask you if that appears to be a picture of the buildings where you said these men were?

A. Yes, this is one of the pictures. I don't identify it so much from the buildings because there are so many buildings of that nature, but I remember this vehicle which appears to be a cart of some kind but which was a drag loaded with oil barrels right in front of the camera, as I was taking the picture.

Q. Now, Mr. Butcher, did you subsequently return to Anchorage?

A. Yes, we came back down to the beach where Mr. Christianson was waiting for us and then flew back to Anchorage.

Q. And then when you returned to Anchorage after that did you get in touch with Mr. Morgan of Columbia Lumber Company?

A. Yes, I called Mr. Morgan on the telephone.

Q. Where was Mr. Morgan at that time?

A. He was at Juneau.

Q. And did you have instructions from Mr. Agostino to call him?

A. I had instructions from Mr. Agostino to negotiate a sale, if I could.

Q. And what did you tell Mr. Morgan as nearly as you can remember?

A. I asked Mr. Morgan, I having placed the

(Testimony of Harold J. Butcher.)
call and being the interrogator, if he ever made an offer to Mr. Agostino for his [402] equipment?

Q. What did Mr. Morgan say?

A. He told me that he had not. I then asked him if he had ever made any agreement of any kind to purchase the equipment and he told me that he had not, and then I asked him if he were willing to purchase the equipment and he told me that he would be willing to discuss the terms of a deal if a deal could be arrived at and would consider it and that he was coming to Anchorage, oh, within a period of a week or ten days on his way to Whittier and he would call at my office and discuss it further.

Q. Did he come to Anchorage?

A. Yes, he did.

Q. About when was that?

A. Well, that would have been perhaps the second week in June, but I am not sure about it, it could have been the first week or the third week and it could have been the last week in May.

Q. And did you have a conversation with Mr. Morgan then?

A. I don't believe he came to my office on that trip. I believe that Mr. Agostino saw him at the hotel—at the Westward Hotel and I called him and he told me he was due in Whittier the following morning and that he would be there about three days and would be back in Anchorage and he would then come to my office.

Q. Did he then come to your office? [403]

(Testimony of Harold J. Butcher.)

A. He then came to my office.

Q. About when was that?

A. Again I am not certain, the dates are vague but it was sometime in June, perhaps the early part of June.

Q. Could it have been the end of June?

A. It could have been very easily.

Q. Who else was present in your office at that time?

A. I had arranged for Mr. Agostino to be there so that whatever discussion we had and any terms which might be arrived at could be agreed upon between the parties and we would finish with the transaction.

Q. Was Mr. Agostino there?

A. Mr. Agostino came to my office at, perhaps, a few minutes before Mr. Morgan did.

Q. Who was—who were you representing in the negotiations?

A. I was representing Mr. Agostino.

Q. What conversation occurred at that time between you, Mr. Morgan and Mr. Agostino, as well as you can recall?

A. Well, the first part of the conversation things weren't very pleasant. Mr. Morgan and Mr. Agostino disagreed with each other on several items which I don't remember the details of and finally they got to discussing the equipment and the timbering that had occurred down there and then as I recall Mr.

(Testimony of Harold J. Butcher.)

Morgan made an offer to Mr. Agostino for his equipment.

Q. And did they agree on a price for the equipment?

A. Mr. Morgan offered $9500 or it could have been $9000 and [404] Mr. Agostino rejected the offer because it wasn't high enough and I intervened from time to time between them and made suggestions and finally I said to Mr. Morgan "What difference does $500 make to you; why don't you make it a flat $10,000?" and he was rather reluctant to do so and after some more discussions he said "All right, then, I won't quibble over $500; I will make it $10,000." And then I turned to Mr. Agostino, "Is that figure agreeable to you?" And he said, "Yes, it was."

Q. Now, was it clear what was to be conveyed for that sum of $10,000?

A. I think it was clear; it was all of the equipment and buildings at Barry Arm—all of the interest that Mr. Agostino had at Barry Arm connected with lumbering and timbering.

Q. And was anything said about having an agreement reduced to writing?

A. Yes. I had taken rather copious notes all along and discussed terms and I believe the financial end of it was that Mr. Morgan was to place some $3200 or $3300 in escrow with either the Clerk of the Court or with the Columbia Lumber Company agency here or someone else, I don't remember, until

(Testimony of Harold J. Butcher.)

a certain lien that Mr. Grasser claimed against Mr. Agostino had been settled. As I recall, Mr. Morgan stated he didn't want to buy this property on those terms and then have Mr. Grasser come along and claim some interest.

Q. Did Mr. Agostino say anything in regard to whether he had [405] a clear title to the property or not?

A. I don't recall too well the conversation on that. I know that the reason that Mr. Morgan didn't want to turn the $3300 over immediately and he so stated was that this Mr. Grasser had a claim on the equipment either in form of a lien or part ownership and that Mr. Agostino did recognize that claim at that time, but stated that he could take care of it with Mr. Grasser. I could be wrong about that but that is my best recollection. And, otherwise, it is my impression that Mr. Agostino did have or claimed to have title.

Q. Then did you subsequently prepare a written contract to embody the terms of the agreement?

A. I asked Mr. Morgan if it would be satisfactory that I draw the contract or did he want his own attorney to prepare it or assist in preparing it and he said "No, if it sets forth the terms as agreed upon it will be satisfactory to me and when it is prepared and ready for my signature send it down to Juneau."

Q. Now, did you draw a written contract?

A. I did draw a written contract.

Q. I show you Defendant's Exhibit No. B and ask you if you can identify it?

(Testimony of Harold J. Butcher.)

Mr. Bell: Your Honor, we admit that is the contract he drew.

Mr. Boochever: If that is admitted that is fine.

The Court: It is admitted that Defendant's Exhibit B is [406] a contract drawn by Mr. Butcher.

Q. (By Mr. Boochever): Mr. Butcher, did you include in that contract a specified list of equipment that was to be conveyed?

A. I didn't list the equipment by items of supplies or items of equipment or machinery or anything of that sort because I didn't have such a list. The only information I had at the time and apparently the only information that Mr. Agostino was able to give me was a general reference to all of the equipment and buildings at that point and I have not seen this contract probably for a year but it is my recollection that I referred in the description of the property to all of that certain equipment and buildings located on Barry Arm. Now I would have to see the contract to know that for sure.

Q. Now, Mr. Butcher, did you write to Mr. Morgan and send him—just a second, so that it won't be leading——. Did you notify Mr. Morgan that you had a written contract?

A. I wrote a letter—let me see, I first called Mr. Agostino in the office and we read the contract and it expressed the terms as he understood it, and it is my recollection he signed it but there I could be wrong again.

(Testimony of Harold J. Butcher.)

Q. I show you the contract, Defendant's Exhibit B, and ask you if you can identify the signature on the last page thereof, the first signature?

A. Well, that was probably the first time I ever saw Bruno's— [407] Bruno Agostino's signature and I have never seen it since that same period of time, but I know that by my name appearing on there as Notary that it was his signature and it was signed in front of me.

Q. And did he acknowledge that he agreed to that? A. Yes, he did.

Q. Now, one other thing, Mr. Butcher, the date here is the 29th day of July, 1948, do you know whether that date is correct in all probability or whether that is a typographical error?

A. May I see that again?

Q. Yes.

Mr. Boochever: I think I can refresh the witness' memory.

Mr. Bell: I don't think he needs any refreshing; he is a very able man.

A. Well, the date "29th" is my handwriting but that would appear to be at least a month later than this transaction occurred. I say that because on the 1st or 2nd day of July I had been elected at the Territorial Democratic Convention as Chairman of the Democratic Delegation to the National Democratic Convention at Philadelphia, which was on the 12th of July and I left here on the 2nd or 3rd of July, it could have been the 1st, but I believe

(Testimony of Harold J. Butcher.)

it was a day or two after the 1st, and I know before the 4th of July, and flew outside stopping at my home town, Ogden, Utah, and then later going east. And I was in Philadelphia until about the 20th of July and then came back by way of Utah again [408] and California and Seattle and I was gone about five weeks altogether. I had had to move my office in June or close my office in the Paddock Building because they desired to open a furniture store in the space and I had no office space to hurry back to and did not find office space until about the first of September, so I was in no hurry to return and I came home to the best of my recollection about the first week in August, so I believe that that date, 29th, should read the 29th of June and the typist apparently typed July and I didn't notice it when I signed it.

Q. (By Mr. Boochever): Mr. Butcher, I show you Defendant's Exhibit G and ask you if you can identify that?

A. Yes, this is my letter written on July 2nd.

Q. To whom was that letter written?

A. It was written to Tom Morgan, Columbia Lumber Company.

Q. Was anything sent with that letter?

A. Yes, I enclosed two copies of the partially executed contract executed by Mr. Agostino.

Q. I now show you Defendant's Exhibit No. C for identification and ask you if you can identify or have ever seen this letter before?

(Testimony of Harold J. Butcher.)

A. Yes, I remember this letter was in my mail upon my return from the States following the trip to which I referred.

Q. And did you discuss that letter with Mr. Agostino? [409] A. Yes, I did.

Q. And was Mr. Agostino agreeable to furnishing a list as requested there?

Mr. Bell: I object to that because it would be a confidential relation between attorney and client.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, I asked Mr. Agostino the same question when he was on the stand. He denied it and he also made no claim of privilege whatsoever at that time nor did his attorney for him. He further stated, "Ask Mr. Butcher" as I recall his testimony to the best of my recollection.

The Court: If the plaintiff, Agostino, waived his privelege, of course, the witness may answer but otherwise not.

Mr. Boochever: It is my position that he did waive his privilege by waiving on cross-examination voluntarily in regard to the same conversation.

The Court: I think not. I don't consider that that is a waiver of privilege.

Mr. Boochever: Well, now, I don't want the conversation but did he furnish you such a list?

Mr. Bell: I object to that for the reason it would be a confidential relation between attorney and client.

The Court: Objection is sustained.

(Testimony of Harold J. Butcher.)

Q. (By Mr. Boochever): Did Mr. Agostino give you any instructions to tell Mr. [410] Morgan or his attorney in regard to that contract?

Mr. Bell: I object to that for the same reason.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, that is instructions to tell Mr. Morgan is what I am asking for. Now it is certainly not confidential because it is to be revealed to a third person.

The Court: Objection is sustained, whatever conversation took place between Agostino and Mr. Butcher, those relations that existed cannot be testified to by this witness.

Mr. Boochever: We ask an exception.

Q. Mr. Butcher, did you notify Mr. Morgan or Mr. McCarrey his attorney after you had talked with Mr. Agostino, did you communicate with them?

A. Yes, I communicated with both Mr. McCarrey and Mr. Morgan.

Q. What did you tell them?

A. To tell them that I was no longer representing Mr. Agostino.

Q. And did you tell him anything about the contract or the compliance with the terms of that letter?

A. Yes, I told him that I had given Mr. Agostino the best advice I was capable and that he had not followed it and that he didn't desire me to pursue further negotiations but to bring suit against the Coumbia Lumber Company, and having participated

(Testimony of Harold J. Butcher.)
in these negotiations and arriving at this settlement I felt that I had rendered adequate service as attorney [411] and felt that if I went further I would not be doing my duty.

Q. Now, did he say anything—did he tell Mr. Morgan or Mr. McCarrey anything about a cabin which was——

Mr. Bell: I object to that. It would be the same thing only he is attempting to avoid the confidential relations by using somebody else's name. If Mr. Agostino said anything about it, why, it would be confidential relations.

The Court: Objection is overruled, because he can tell what he said to McCarrey. The witness can tell what he said to McCarrey or to Morgan.

The Witness: May I have the question read again?

(Question read.)

Q. (By Mr. Boochever): ——which was located at Barry Arm? A. Yes, I did.

Q. What did you tell him in that connection?

A. I told them that apparently Mr. Agostino had taken possession of a cabin on Barry Arm and would decline to permit that cabin to become the property of the Columbia Lumber Company under this contract if it were finally consummated.

Q. And did you tell them anything about a list of the equipment being furnished?

Mr. Bell: Object to it on the same ground, Your Honor.

(Testimony of Harold J. Butcher.)

The Court: Objection is overruled.

Mr. Bell: Exception. [412]

The Court: He may tell what he said to McCarrey or to Morgan.

Mr. Bell: I object to it until the time and place is fixed, please, on that ground.

The Court: Witness can fix the time and place as nearly as possible.

The Witness: Mr. Agostino did not have a telephone, as I recall, and I sent a friend of mine, loaned him my automobile, to go to Mr. Agostino's house. This was following my return from the trip outside. And told him I was anxious to see Mr. Agostino because I had this letter from Mr. Morgan.

Mr. Bell: Now, I object to what he told this person that he sent out to get Mr. Agostino because that would be purely hearsay.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, anything that this witness told him is not hearsay; that is what this witness himself said.

The Court: He is reciting something he said to a third person that he was anxious to see Agostino, which isn't evidence at all in this case.

Q. (By Mr. Boochever): Very well, will you continue in fixing the time.

A. Probably the first or second week in August.

Q. At that time when you told him, did you mention anything about the list of equipment that was requested in that letter? [413]

(Testimony of Harold J. Butcher.)

A. Yes, I told him that Mr. Agostino refused to give them a list of equipment.

Mr. Boochever: No further questions.

The Court: Counsel for plaintiffs may examine.

Cross-Examination

By Mr. Bell:

Q. Mr. Butcher, when did you last talk to Mr. Agostino before you went to the Republican—Democratic Convention—both being so close together and I was one and you were at the other, excuse me for the remark.

A. I am sorry, will you repeat your question?

Q. When was the last time you talked to Agostino before you went to the Democratic Convention?

A. Well, probably the day he signed the contract, which would be the 29th of June. I might have seen him the next day but I don't remember.

Q. Mr. Butcher, could you be mistaken about when that contract was signed? I notice that it is dated July—everywhere in the heading it is July and in the execution it is July, in the acknowledgement it is July—could you be mistaken about that in any way?

A. No, I think not. When I approach the end of the month and I am producing papers for signature, in order to avoid re-doing the papers, and I am close to the end of the month and I don't know when my client is coming in to sign and I feel it will not be the day I prepare the instrument, I usually date

(Testimony of Harold J. Butcher.)
it in the following month. For instruments that I did on the 31st or the 28th of May and along in there where I felt I would not see my client, I dated in June, knowing they would be signed in June. This was the very last of July—last of June and I believe that the reason the contract cites July all the way through was because I didn't know I was going to see Mr. Agostino on the day I did and when he did we inadvertently failed to change the word "July" to "June" and I am further convinced that it was June 29th because my letter in which I sent this signed copy or the signed copies of the contracts to Mr. Morgan was dated on the second day of July and his letter acknowledging receipt of the contracts was dated, as I recall, on the 19th of July, which would indicate that this is the date, 29th of June, is the correct date.

Q. I hand you this instrument that has been marked Plaintiff's Identification Exhibit No. 33 and ask you to look at that and see if there is a date in that that would mean anything to you?

A. Well, there is a date in here at the beginning of the contract which says—looks to me like 5-A, but it could be 5th, but it is not my handwriting.

Q. Do you recognize whose handwriting that is?

A. No, I could not, it is just a figure.

Q. Would you look back over on the back, Mr. Butcher, on the third page, do you see the same thing over there, don't you? [415] A. Yes.

Q. Does it look like the same handwriting?

(Testimony of Harold J. Butcher.)

A. The "5" that is not my handwriting. The "5" looks identical to the "5" on the first page but the "th" if this is a "th" on the first page is different. It could be carelessness in writing but it is in no case—neither case—my handwriting.

Q. Of course, I don't think it is material, Mr. Butcher, but I wanted to use that for a suggestion so it would help you get the dates as near correct as you can. Now, when you sent that contract to Mr. Morgan over at Juneau you sent that in June or July?

A. I sent that on the second of July because I signed the letter on that date transmitting the contracts.

Q. Mr. Butcher, this date is correct—July 2nd—on that instrument?

A. Yes, I am certain that is correct, Mr. Bell.

Q. And you enclosed a copy in that—Didn't you enclose this original and a copy in that to Mr. Morgan?

A. Well, the letter says I enclosed two copies which I had Bruno sign and that would be one of the copies there that you have, certainly.

Q. Then this original is really made with the original stroke of the typewriter—this one?

A. Yes, that is the ribbon copy.

Q. And you note that that is now signed Thomas A. Morgan. [416] Did you ever see that contract before today? A. No.

Q. After it was executed?

A. No, I haven't.

(Testimony of Harold J. Butcher.)

Q. That was never returned to you, was it, signed? A. No.

Q. Did you ever know about Mr. Morgan putting up any money to anybody or any checks to anyone during the time you represented Mr. Agostino?

A. It is my recollection that when I returned and found the letter dated July 19th from Mr. Morgan stating that he had placed $3300.00, I believe, with the Columbia Lumber Company up here, their agent here at that time, their manager was our counselman, known as Red Summers—C. D. Summers, and it was my recollection I called Mr. Summers before conferring further with Mr. Agostino. In fact, I know I did because when Mr. Agostino and I differed then I called to verify the fact that the money was there, I remember that now.

Q. You say that you and Mr. Agostino differed? In other words, there was some arguments between you and some dissatisfaction between you?

A. No, I didn't say dissatisfaction, I said differences, and the differences were whether Mr. Agostino would furnish the list of equipment or whether he would not.

Q. He had told you before that he had waited long enough [417] for the money to come and that he wasn't going to wait any longer, had he told you that?

A. Yes, he might have said that. I remember him being very indignant about it and saying words to that effect.

(Testimony of Harold J. Butcher.)

Q. Do you know when you were no longer his counsel and Mr. Ross and Mr. Grigsby were employed? Do you know about that?

A. I don't know anything about Mr. Grigsby being employed. When Mr. Agostino and I parted the best of friends I explained my position to him and he was very kind and asked me how much he owed me and I told him for my effort up to date for $100.00 and he made a promissory note not having the money at that time and I was glad to wait and he asked if I could recommend another attorney for him. He apparently relied upon my judgment in the matter and I told him to go see Mr. Ross in the Central Building.

Q. Are you sure that wasn't Mr. Roley?

A. Now, that was Mr. Ross—now, it could have been Mr. Roley but it is my recollection it was Mr. Ross.

Q. About what date was that, Harold?

A. Oh, sometime in the middle—second week or middle of August.

Q. You are sure?

A. No, I am not sure of it. I only think it might be, due to the circumstances surrounding my return.

Q. Now, after you got that letter from Mr. Morgan, do you [418] know how he got it back from you—the one that you testified about? I hand you Defendant's Exhibit C, which is a letter dated July 19, 1948. I believe you testified you received that through the mails from Mr. Morgan? A. Yes.

(Testimony of Harold J. Butcher.)

Q. Do you know how Mr. Morgan got possession of it?

A. Well, I don't know how Mr. Morgan got possession of it. I know how I did get dispossessed of it.

Q. How did you get dispossessed of it?

A. As I explained earlier, when I returned from the States I had no office and I maintained my office in my home for quite a while and as a result of it my papers were greatly confused. When Mr. Agostino and I parted company, he naturally wanted his papers and I was glad to give them to him, including the pictures and anything else I might have had. Sometime afterwards after I had located an office next to the Bootery on "G" Street I discussed this matter with Mr. McCarrey and Mr. McCarrey at that time, to my best recollection, inquired if I had anything that might throw light on this situation and I believe at that time I turned over to Mr. McCarrey this letter. And I believe I had another letter written to me from Frank Heintzleman, the Chief Forester for Alaska at Juneau and I think I turned that over at the same time to Mr. McCarrey but I could have turned that over to Mr. Agostino. I am just vague about it, but I am certain that is how I lost control of the letter. [419]

Q. You think you gave it to Mr. Morgan's counsel, then, Mr. McCarrey?

A. To Mr. McCarrey.

Q. He was Mr. Morgan's counsel?

(Testimony of Harold J. Butcher.)

A. Yes.

Q. How early in the year did you know that Mr. McCarrey was representing Mr. Morgan in this controversy?

A. Oh, I think I knew that right to begin with because when Mr. Morgan came up the first time and didn't come to my office going to Whittier instead, I think Mr. McCarrey told me at that time that he represented Mr. Morgan or would represent him in this matter.

Q. Could you be mistaken, Harold, about telling Mr. Agostino about that particular letter or were you talking about the letter you wrote to the people——

A. I couldn't be mistaken at all about telling Mr. Agostino that Mr. Morgan wanted a list of the equipment.

Q. No, I don't mean that. Could you be mistaken about telling Mr. Agostino that you had that letter in your possession?

A. That is what I was answering. I couldn't be mistaken because the only knowledge I had that Mr. Morgan wanted a list of equipment was from this letter and Mr. Agostino and I had differed. Our only difference was over that list of equipment.

Q. Well, did you feel, Mr. Butcher, that you should give your clients'—your clients' information to the opposing [420] counsel in this matter?

A. Well, Mr. Morgan had written this letter to me. There was no confidential information in this

(Testimony of Harold J. Butcher.)
letter. It was simply stating his desire for a list of the equipment and restating the terms under which he had entered into the contract. And Mr. McCarrey being somewhat in the dark about it at that time. I am not certain that is how he got it but that is my recollection that is how it happened, so that he would be informed as to what had actually happened. I don't know whether he promised to return the letter to me or not, but I am certain that that is the way it came in his possession.

Q. You are quite sure you didn't give it to Mr. Morgan at any time?

A. I am certain I didn't give it to Mr. Morgan.

Q. And if he had it here in Court he must have gotten it through some other source?

A. As a matter of fact I don't think I have seen Mr. Morgan again personally until I ran into him here in the hall after this trial had commenced from the time he was in my office and negotiated the contract.

Q. And when was it that you and Mr. Agostino had this parting of the ways, as you have described, was that in August?

A. I think I answered that question by saying that it was probably the second week or close thereto in August.

Q. Say, when you were down there at that place, Mr. Butcher—— [421] A. What place?

Q. At the Barry Arm Camp, did you see Lambert down there?

(Testimony of Harold J. Butcher.)

A. I saw a man known as Blacky, if his last name was Lambert that was the man.

Q. What was he doing there?

A. He had a crew of men there, I believe logging at this camp. When we went up to the camp, Mr. Agostino and I, we didn't enter the camp we just stood on the outskirts and watched the men and then turned and left and as we started to leave two fellows who, I believe, were workmen, came across the creek. One of them had a rifle and they were heading down toward the beach and Mr. Agostino spoke to them and I believe he asked them where Mr. Lambert was and they said he was off somewhere. And as we walked down this half-mile road toward the beach suddenly Mr. Lambert came from —my recollection it was a road going up a hill at the side—and Mr. Lambert came from that direction and Mr. Agostino spoke to him quite congenially and they spoke as two friends. There was no differences that I could detect and he introduced me to him, calling him Blacky, and I am impressed with the man as a result of that name of Blacky rather than any other name.

Q. Mr. Butcher, did you see the bunkhouse and cookhouse at—that Bruno showed you there that was his old place?

A. If that is the rather large building, contrasting it with the other two sheds in which the tractors were which was towards [422] the glacier. I had no sense of direction there but I recall Mr.

(Testimony of Harold J. Butcher.)
Agostino pointing out a glacier further down from this larger building, if that is the building you mean, yes, I entered that building with Mr. Agostino and went upstairs where there was, I believe, some beds and mattresses.

Q. What kind of a place was that?

A. It wasn't a bad place.

Q. It was rather nice, wasn't it?

A. It was my impression it was rather nice. I wouldn't have minded stopping there.

Q. And, now, about the caterpillars, did you see them, they were just sitting in the sheds I believe at the time?

A. They were sitting in the sheds and we entered the sheds or the leanto. I don't remember any doors, but I do remember the buildings they were in and it could have been a leanto.

Q. You were not with him but the one trip, were you, Mr. Butcher?

A. I only made one trip down there.

Q. And Mr. Agostino had a Kodak and at least part of the pictures you snapped yourself, did you?

A. I am certain that I snapped all the pictures. Mr. Agostino is, for a gentleman his age, an extremely active man and he climed those steep hills almost like a billy goat and I found myself fagged out tagging behind him. I carried the Kodak, which was about all I was capable of carrying then and I know that I [423] snapped all the pictures.

Q. That was with his Kodak?

(Testimony of Harold J. Butcher.)

A. With his Kodak.

Q. You didn't go back there with him in September? A. No, I didn't.

Mr. Bell: I think that is all.

The Court: Any redirect examination?

Mr. Boochever: I believe there was one question, Your Honor. No further questions.

The Court: That is all, Mr. Butcher.

(Witness excused.)

The Court: Another witness may be called.

VENETIA HAHN

By Mr. Boochever:

Q. What is your name, please?

A. Venetia Hahn.

Q. And what is your occupation?

A. Deputy Clerk of the Court.

Q. And as such do you have custody of the records of the Court? A. Yes, I do.

Q. Do you have a case entitled No. A-5196?

A. Yes, I do.

Q. What is the title of that case?

A. Bruno Agostino and Stanley Socha, co-partners doing business under the firm name and style of Barry Arm Camp, plaintiffs, [424] versus Ellamar Packing Company, Inc., a corporation, defendant.

Q. Is that case pending at the present time?

Mr. Bell: We will admit that it is and save time.

(Testimony of Venetia Hahn.)

The Witness: Yes, it is.

Mr. Boochever: Very well.

Q. Will you read paragraph 3(a) of the complaint of that case?

Mr. Bell: I object to any part of it unless it is all put in. I am perfectly willing that any particular document in there be put in of the whole thing but not any one sentence out of it.

Mr. Boochever: I am not trying to get one sentence, what I am trying to get in is that it concerns a certain caterpillar.

Mr. Bell: Why don't you put in the complaint?

Mr. Boochever: We are willing to have it——

The Court: I think there are several complaints, do you want the——

Mr. Boochever: I want the third amended complaint.

The Court: Without objection the third amended complaint will be received and appropriately marked.

Mr. Bell: No objection.

The Court: I presume that copy can be substituted?

Mr. Boochever: We can have it typed up, if necessary, but if counsel——

Mr. Bell: We have no objections to any method, Your Honor wants to handle it. If I had a copy I would sure give it to him.

Mr. Davis: If we may take the file home this evening we [425] will have a copy ready.

(Testimony of Venetia Hahn.)

The Court: I think the Clerk may desist from marking the file as an exhibit because that case is still pending, as I understand, and it will be understood that that complaint—the third amended complaint—or a certified copy thereof will go in as Defendant's Exhibit K, I presume.

Mr. Bell: That is perfectly acceptible to us.

The Court: And it may be read to the Jury at some appropriate time. Will counsel stipulate that it may be read to the jury without keeping the witness on the stand?

Mr. Bell: Oh, yes, sir.

Mr. Boochever: Very well.

Mr. Ross: And I do have an extra copy and I will save them the trouble of writing it over.

The Court: Very courteous of you.

Mr. Boochever: Your Honor, I wanted particularly to get the prayer of that complaint read.

The Court: You may read the prayer now if you want to and the whole thing can be read to the jury by either of counsel at any time and the exhibit will go to the jury, of course, with the other exhibits.

The Clerk: Very well, Your Honor.

Mr. Boochever: Here is the prayer of this complaint: "Wherefore, plaintiffs pray for a decree of this Court adjudging [426] that the plaintiffs have fully paid for the caterpillar tractor and equipment above described and that there is no balance due thereon to the defendant, Ellamar Packing Company, Inc., and that the title to said

(Testimony of Venetia Hahn.)

tractor and equipment above-described is in the plaintiffs, free and clear, of any and all liabilities to the defendant and for all costs and disbursements herein, including reasonable attorneys fees, and for such other and further relief as the Court may deem equitable and just in the premises, and for general relief."

"Herman H. Ross, and Bailey E. Bell, Attorneys for Plaintiffs."

"United States of America,

"Territory of Alaska—ss.

"Stanley Socha, being first duly sworn, upon oath deposes and says: That he is one of the plaintiffs in this action; that he has read the foregoing Third Amended Complaint, and knows the contents thereof, and that the same is true as he verily believes."

"(Signed) Stanley Socha. Stanley Socha."

"Subscribed and sworn to before me this 11th day of May, 1949. (Signed) Bailey E. Bell, Notary Public in and for the Territory of Alaska."

Mr. Ross: Later on, Your Honor, we want to read the entire complaint.

The Court: Yes, it may all be read. I think there is some provision of the Code which says the exhibit must be read before [427] the witness leaves the stand, but there is no point in keeping the witness on the stand.

Q. (By Mr. Boochever): Now, do you have the case there, No. A-4644? A. Yes.

(Testimony of Venetia Hahn.)

Q. What is the title?

A. Bruno Agostino versus Raymond Grasser, defendant.

Q. And is that case still pending at this time?

A. Yes, it is.

Q. Now, has any answer and cross complaint been filed in that case?

A. It was filed May 13, 1949.

Q. Has any reply been filed to the answer and counter claim? A. No, there hasn't.

Mr. Bell: I didn't understand the date?

The Witness: The answer and cross complaint was filed May 13, 1949.

Mr. Bell: Who was that filed by?

The Witness: That was filed by Davis & Renfrew, Attorneys for defendant.

Mr. Boochever: We would like just part of that to be read, Your Honor.

Mr. Bell: We object to the answer and cross complaint of Mr. Davis' in another case unless he wants to introduce the whole record. [428]

Mr. Davis: Your Honor, the time for replying has long expired on that and it is five days under the rule of the Court and any affirmative allegations are deemed admitted by the plaintiffs in the case.

Mr. Bell: Mr. Ross and I are not attorneys in the case in any way so we would not be bound by it.

The Court: It is true that there is a five-day rule for requiring that replies be filed to answer in cross complaint but that matter is to some extent

(Testimony of Venetia Hahn.)
under the control of the Court and a reply may conceivably be filed after the time provided by rule has expired. What is the offer, Mr. Boochever?

Mr. Boochever: Your Honor, I imagine that should be made in the absence of the jury, shouldn't it?

The Court: Well, it is five o'clock now.

Mr. Bell: I don't think that it is competent for any purpose. Mr. Ross and I are not attorneys. Mr. Hellenthal, I think, is the attorney in the case.

The Court: If counsel for the defendant thinks that the failure to file reply can go to the jury as an admission of the averments of the counterclaim I must advise him that the Court will not instruct the jury in that fashion at all. It will be just a claim and not an admission by the plaintiff Agostino in that case, if anything.

Mr. Boochever: May the answer and counterclaim come into evidence, then, Your Honor? [429]

Mr. Bell: No, I object to it, Your Honor, it is not competent. It is incompetent for any purpose; it is irrelevant.

The Court: Objection is sustained.

Mr. Boochever: Very well, Your Honor, no further questions.

Cross-Examination

By Mr. Bell:

Q. What date was that suit originally filed?

A. August 6, 1947.

(Testimony of Venetia Hahn.)

Q. August 6, 1947, and it is still pending, isn't it?

A. Still pending.

Q. What date was this other suit against the Ellamar Packing Company filed? What date was the suit first filed? I guess you could tell by the summons, probably. A. September 22, 1948.

Q. September 22, 1948. Thank you, that is all.

Mr. Boochever: Your Honor, in regard to this second suit here which we ruled out on the answer in counter claim, I would like to ask one more question, if I may. This is subject to objection of counsel, too, so don't answer until they have had an opportunity to object.

Redirect Examination

By Mr. Boochever:

Q. Do you know what the subject matter or can you determine what the subject matter of that suit it? A. Well—— [430]

Mr. Bell: I object to that for the reason that is incompetent, irrelevant and immaterial.

Mr. Boochever: I ask to offer the complaint in evidence, then, Your Honor, at this time. Do you have any objection to that, counsel?

Mr. Bell: The complaint?

Mr. Boochever: Yes.

Mr. Bell: No.

Mr. Ross: We object to taking up the time of the Court and the Jury in offering the complaint.

The Court: The complaint may be admitted in

(Testimony of Venetia Hahn.)
evidence without objection as Plaintiff's Exhibit L and may be read to the Jury in the absence of the witness without objection.

Mr. Boochever: No further questions.

The Court: This is the complaint in A-5196, Agostino versus Ellamar? In that case, too, perhaps—well, maybe there is no avoiding marking it as an exhibit.

Mr. Davis: Your Honor, if I may borrow the file I will make a copy of it so that it can be compared and then——

The Court: Very well, we will do that. Let Mr. Davis borrow the file and a copy will be substituted. Both of these complaints may be read to the jury later.

It is now five o'clock and evidently we will not be able to finsh the case today, so the trial will be continued until next Monday morning at ten o'clock. Ladies and Gentlemen, you [431] will remember the law that you should not discuss the case among yourselves or with others or listen to any conversation about it or form or express an opinion until it is finally submitted to you.

The Jury will retire and report Monday morning at ten o'clock.

Court now stands adjourned until next Monday morning at ten o'clock.

(Whereupon, at 5:15 p.m., Friday, June 3rd, 1949, the case was recessed until 10 o'clock, a.m., Monday, June 6, 1949.) [432]

Monday, June 6, 1949

(Whereupon, at 10:00 a.m., the above-entitled matter came on for taking of testimony.)

The Court: The Clerk will call the roll of the jurors in the box.

(Jurors names were called by the Clerk and answered to.)

The Clerk: They are all present, Your Honor.

The Court: Another witness may be called on behalf of the defendant.

EDWARD F. MEDLEY

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

A. What is your name?

A. Edward F. Medley.

Q. What is your occupation, Mr. Medley?

A. Attorney.

Q. And are you licensed to practice law in the Territory of Alaska? A. I didn't hear that?

Q. Are you licensed to practice law in the Territory of Alaska? A. Yes, sir.

Q. And are you in the State of Washington?

A. That is where I practice mostly—in the State of Washington.

Q. Judge Medley, in your capacity as attorney has a suit [435] brought by Mr. Agostino and Mr.

(Testimony of Edward F. Medley.)

Socha against the Ellamar Packing Company come to your attention? A. It has.

Q. Involving a tractor?

A. Involving a tractor.

Q. Have you ever had occasion to give instructions to the Ellamar Packing Company in regard to that tractor? A. I have.

Q. What instructions did you give them?

Mr. Bell: I object to that because that would not be binding on these people.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, in the first place we would have to know in regard to our motion in regard to the reply that point would be of considerable relevance here.

The Court: Motion is denied.

Mr. Boochever: The motion is denied in its entirety, is that correct, Your Honor?

The Court: Yes.

Mr. Boochever: Then certainly it is relevant for us to show the relevance of the tractor.

The Court: Not the instructions.

Q. (By Mr. Boochever): Do you know whether the Ellamar Packing Company repossessed that tractor? [436]

Mr. Bell: I object to that. It wouldn't be binding here under the terms of the suit.

The Court: Overruled, tell what happened.

The Witness: Yes, sir, it did.

(Testimony of Edward F. Medley.)

Q. (By Mr. Boochever): Do you know why they repossessed it?

Mr. Bell: Object to that. That is a conclusion.

The Court: A proper answer is possible under the question.

Mr. Bell: I object to it on the further grounds that it is incompetent, irrelevant and immaterial and not within the issues set forth in the pleadings and no proper foundation has been laid.

The Court: Overruled.

Q. (By Mr. Boochever): Would you answer the question, please?

A. Well, the tractor was originally sold on a conditional sale contract, which was delinquent. We asserted our rights under the conditional sales contract and repossessed it.

Q. Do you know whether the repossession was done because of the request or anything of that nature of Columbia Lumber Company?

Mr. Bell: Object to that for the reason it would not be competent. He is an attorney down in Seattle.

The Court: He can speak so far as he knows.

The Witness: The request was done on my advice and instruction. The repossession was done on my advice and instructions without any connection with the Columbia Lumber Company as far [437] as I am concerned.

Mr. Boochever: No further questions, Your Honor.

(Testimony of Edward F. Medley.)

The Court: Counsel for plaintiff may examine.

Cross-Examination

By Mr. Bell:

Q. Mr. Medley, as to whether or not that contract of sale was a conditional sales contract, that is your opinion that it is a conditional sales contract, isn't it? A. That is right.

Q. And there is a controversy now in Court over that, whether or not it was a conditional sales contract or a straight sale, isn't there?

A. Well, I wouldn't interpret that controversy quite like that, Mr. Bell.

Q. Well, the question of whether or not it is a conditional sales contract that you have told the jury that it was, it is just your opinion that it is, isn't it?

A. Well, to answer that, I would say this, that the contract speaks for itself and I haven't got it before me. But we acted and proceeded and took possession under it as if it were a conditional sales contract.

Q. Mr. Medley, do you know—did you know or were you advised of the fact before you directed your company to take possession of that tractor that Mr. Brown had agreed with Mr. Agostino to call it square for the tractor and not sue each other about it [438] more than two years before that?

A. The only way I can answer that, Mr. Bell, is that Mr. Brown says he had no such agreement with Mr. Agostino.

(Testimony of Edward F. Medley.)

Q. But, now, if they did have such an agreement you would not have advised them to—if Mr. Brown had told you he had that agreement you would not have advised them to take the tractor, would you?

Mr. Boochever: Object to that; it is pure conjecture.

The Court: Objection is sustained.

Mr. Bell: Exception.

Q. You do know as a lawyer if that agreement did take place it would be binding, wouldn't it?

A. Please repeat that.

Q. If there was a controversy between Agostino claiming he had paid $16,000 in money and timber for that tractor and Mr. Brown was still claiming more and claiming he had not paid that amount and they were in a quarrel about it and then they did agree to each refrain from sueing the other and had been threatening to sue each other up to that time, you will admit that that would be a binding agreement if Mr. Brown, Vice President of the Ellamar Packing Company, in charge, did make that agreement, wouldn't you?

Mr. Boochever: Object to that question as pure conjecture, same objection.

The Court: Objection is sustained. [439]

Mr. Bell: Exception. We want to make an offer of proof, then, Your Honor.

The Court: The jury will retire to the jury room.

Mr. Bell: We offer to prove by this witness, if he were permitted to answer, that question, that he

(Testimony of Edward F. Medley.)
would admit that if that kind of an agreement had been made and he had known about it he would not have advised attempting to take the tractor because the contract would have been binding and that his action in taking it or directing his company to retake it was not based upon the theory that Mr. Brown had made such understanding but was made without his knowledge of such an agreement.

Mr. Boochever: Well, of course, that is obviously calling for a conclusion of law from the witness and there is no testimony at all in regard to such an agreement having been made. The testimony is to the contrary.

Mr. Bell: Your Honor, I call attention before you ruled on the statement of counsel that the whole thing is merely an opinion of the witness—everything he has testified to—outside of the fact that he has been and is attorney for the Ellamar Packing Company and that no part of it is our contention should have been admitted but since it has been admitted over the objections of the defendants then we have the right to cross-examine on that line.

The Court: The objection is sustained and the offier to prove excluded. [440]

Mr. Bell: Exception, please.

Mr. Boochever: Your Honor, at this time we might also mention outside the present of the jury that in the copy of the complaint which was introduced into evidence yesterday in that Ellamar Packing Company case, the copy prepared does not

(Testimony of Edward F. Medley.)
include a copy of the conditional sales contract made a part of the complaint and we meant that to be included quite naturally in the evidence when the complaint is introduced.

Mr. Bell: I will agree that copy that is attached to the other complaints ahead may be substituted and even detached and attached to this instrument.

Mr. Boochever: That is perfectly satisfactory, your Honor.

Mr. Bell: And we will notify the Court in advance that we will ask an instruction as to whether or not that was a conditional sales contract or a straight out and out sale, and we would like to have a copy of it before the Court as soon as we could and we will try and get that done right away, because we contend that it was an out and out sale and not a conditional sales contract at all.

The Court: As I understand, then, you have stipulated that a copy of the contract, whether it was a conditional sales contract or not, may be attached to the complaint or to the amended complaint in the suit of Agostino against the Ellamar Packing Company which goes to the jury?

Mr. Bell: That is right. [441]

Mr. Boochever: That is right.

Mr. Bell: But with the understanding that Your Honor will instruct one way or the other as to whether it is or is not a conditional sales——

Mr. Boochever: I object to that understanding.

The Court: It can't be—no, if that is a part

(Testimony of Edward F. Medley.)
of the stipulation it shouldn't be entered because I could make no commitment to instruct on that point at all. We are not trying the Ellamar Packing suit. I wouldn't be prepared to pass upon it until I hear all the evidence of the suit. I could not pass upon it upon this brief fragmentary evidence. From what I understand from my inadequate recollection of it, one of the vital issues to be decided upon the suit is that in the Agostino versus Ellamar Packing Company.

Mr. Bell: That is correct, but the instrument itself will determine whether or not it is.

The Court: As far as I can see, Mr. Bell, I will not be justified at all in passing upon the legal——

Mr. Bell: Well, think it over and we will ask an instruction.

The Court: But your stipulation still stands that a copy of it may go to the jury—a copy of the complaint of Agostino versus Ellamar Packing Company?

Mr. Bell: We will stipulate it can be attached to the complaint because it should have been attached. On that theory [442] it should have been attached and if it isn't, why, we intended to attach it and we will attach one to the end.

The Court: Any further cross-examination.

Q. (By Mr. Bell): Mr. Medley, have you represented Mr. Morgan in other litigation?

A. Do I represent Mr. Morgan?

Q. Yes. A. No, sir.

(Testimony of Edward F. Medley.)

Q. Have you represented the Columbia Lumber Company? A. No, sir.

Q. And you live in Seattle, do you?

A. Yes, sir.

Q. And did you volunteer your testimony here in this case?

A. No, sir, I am up here on other business and Mr. Boochever spoke to me about the case yesterday.

Q. You haven't been subpoenaed, have you?

A. No, sir.

Q. I mean you are a volunteer witness here at this time?

A. I am here as a courtesy to Mr. Boochever.

Q. As a what?

A. As a—I came here as a courtesy to Mr. Boochever.

Q. That is one of the attorneys for the defendant? A. Yes, sir.

Mr. Bell: That is all. [443]

The Court: That is all.

Mr. Boochever: That is all.

The Court: Another witness may be called.

GEORGE B. SCMIDT

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name?

(Testimony of George B. Semidt.)

A. George B. Semidt.

Q. What is your occupation, Mr. Semidt?

A. I am assistant to the Manager of the Columbia Lumber Company.

Q. Calling your atention to July of 1948, what was your occupation then?

A. The same—Assistant to the Manager—to the President.

Q. Did you in that capacity ever have occasion to sign any checks made payable to the Clerk of the Court or to Bruno Agostino?

A. Yes, sir, I did.

Q. I show you Defendant's Exhibits H, I and J and ask you if you can identify them?

A. Yes, I can.

Q. What are they?

A. They were checks tendered in payment of equipment that we [444] were to buy from Bruno Agostino.

Q. Do you know when those checks were signed?

A. Approximately sometime between July 10th—well, it was about July 10th was about the day they were signed, about then.

Q. Do you recognize the signatures that were on those checks? A. I do.

Q. Whose signatures are they?

A. Thomas Morgan, the President, and my own.

Mr. Boochever: At this time we would like to offer these checks into evidence as Defendant's Exhibits H, I and J.

(Testimony of George B. Semidt.)

Mr. Bell: Object to them, they are incompetent, irrelevant, not within the issue and no proper foundation laid.

The Court: Objections are overruled and they may be admitted and marked as Defendant's Exhibits H, I and J.

Q. (By Mr. Boochever): Mr. Semidt, after the signing of those checks did you have any further connection with them?

A. Yes, I took the checks up to Mr. McCarrey's office and he was representing the Columbia Lumber Company in this transaction and I gave them to him sometime around between the 10th and the 15th or the 20th of July.

Q. And did you give Mr. McCarrey any instructions as to what to do with those checks as the attorney for the Columbia Lumber Company?

Mr. Bell: I object to that—a communication between an [445] attorney and client would not be binding upon our clients unless they were present and heard it or knew about it.

The Court: Overruled.

Mr. Bell: Exception.

The Witness: I gave the checks to Mr. McCarrey and told him that they were to be used in the purchase of this equipment when and if the contract was fulfilled.

Mr. Bell: Now, Your Honor, I move to strike the second part of the answer where he said he told Mr. McCarrey to give them to or to use them or

(Testimony of George B. Semidt.)
give them to Mr. Agostino if the purchase went through, because that is purely a conversation.

The Court: Motion is denied; exception will be noted.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Now, did you state anything in regard to what you meant by "if the contract went through"?

A. Well, there were conditions which were to be fulfilled and if they were fulfilled then the contract would be valid.

Q. Do you know what the conditions were?

Mr. Bell: Object to that as being incompetent, irrelevant and immaterial what he knew about it.

The Court: Did you participate in any of the conversations between Agostino and Mr. Morgan?

The Witness: Did I? No, no, sir.

The Court: All you know about it is what Mr. Morgan told [446] you?

The Witness: That is right.

The Court: Objection is sustained—hearsay testimony.

Q. (By Mr. Boochever): Mr. Semidt, in giving your instructions to Mr. McCarrey, did you tell him on what conditions to turn over the checks?

Mr. Bell: I object to that as purely a hearsay, a self-serving declaration, incompetent, irrelevant, immaterial, not within the issues of the case and for the further reason no foundation has been laid.

The Court: Objection is overruled.

(Testimony of George B. Semidt.)

The Witness: Repeat your question, please.

Mr. Boochever: Read the question.

(Question read.)

The Witness: Yes, I told him.

Mr. Bell: I object to that, he has answered the question.

The Court: Overruled.

Mr. Bell: Exception.

The Witness: Yes, I told him that we had to follow the conditions outlined in the contract and if they were not complied with, why, then, they were not to be surrendered.

Mr. Bell: Now, I move to strike the answer as not responsive to the question—the question was "Did you tell him something"?

The Court: Motion is denied. [447]

Mr. Boochever: No further questions.

The Court: Counsel for plaintiff may examine.

Cross-Examination

By Mr. Bell:

Q. Did you sign the checks—do you sign the ordinary checks at the Columbia Lumber Company?

A. Yes, I have that privilege.

Q. What kind of a check book did you use for issuing those—I mean for issuing any checks that you write over there?

A. We usually have a regular check—the regular form.

Q. And is it numbered?

A. Well, usually the checks are numbered. In

(Testimony of George B. Scmidt.)

this particular case they were not for the reason we issued them in the office here at Anchorage and they usually come from Juneau where we do have the regular sequence of checks. In this case there was time when we didn't have it to do so we did it here.

Q. Do you pay bills to your employees and other people here in Anchorage with checks that you sign?

A. Yes, I can do that, too, but we carry two different accounts here—we carry a general account and we carry a revolving account for the yards and on each of those I have the authority to sign.

Q. Now, do you use numbers on those checks, now? A. Yes, that is right.

Q. You have used numbers for that purpose all the way through, [448] I believe you stated?

A. We do, yes, there are exceptions, though.

Q. Now these checks are made on just a plain check—Columbia Lumber Company name doesn't appear on it only on a typewriter down at the bottom, does it? A. That is right.

Q. That is what we would use if we just walked in the bank—what is called a counter check at the bank? A. That is right.

Q. Now the checks that you pay bills with here in town, the Columbia Lumber Company name is printed on them, isn't it? A. That is right.

Q. Now, when did you start using printed checks for the payment of bills here?

A. We always have used printed checks.

Q. You have always used them?

(Testimony of George B. Semidt.)

A. That is right.

Q. Are you sure that you talked to Mr. McCarrey when you went up to his office?

A. Certainly I talked to Mr. McCarrey.

Q. Do you know about what time that was?

A. Sometime between the 10th and probably the 15th or 20th of the month. I don't recall the exact date but I do know it was along about that time. I had been in Juneau along about the 4th of July and I got back here about the 7th or the 8th and it [449] was after I returned.

Q. Do you know why those checks are dated different dates?

A. They are dated different dates—they were to be paid on those particular dates on which they were dated.

Q. And you don't know why that Bruno Agostino has never seen those checks up to this time, do you? A. No.

Q. Do you have any idea—can you tell the jury any idea why they weren't delivered to Mr. Agostino or to his attorney?

A. Well, I don't know that, only by hearsay.

Q. Then one was payable to the Court Clerk for $3,300.00, isn't it? A. Yes, that is right.

Q. And that was never delivered to the Court Clerk, was it?

A. I don't know that, couldn't tell you.

Q. It doesn't show cash through any bank, does it? A. No, it doesn't.

(Testimony of George B. Semidt.)

Q. It never has been cleared through the bank and charged to the Columbia Lumber Company account? A. Not that I know of.

Q. Did you ever stop payment on them?

A. No, sir.

Q. And you didn't know where they went to until now?

A. Well, no, I don't know, I couldn't tell you where they were held. I knew where they were held but I didn't see them. [450]

Q. Did you intend that your attorney, Mr. McCarrey, should give them to Bruno Agostino?

A. No, we intended to give them to his attorney after this thing was settled.

Q. After it was settled?

A. After the terms of the contract were consummated.

Q. What more was to be done by the terms of the contract? A. Well, as I understood it——

Q. No, not what you understood; what did you know about it was to be done?

A. Just telling you he had to abide by the conditions that were stated in the contract and that was Mr. McCarrey's lookout not mine.

Q. And then that so far as you know had been done before the contract was signed, had it not?

A. No, it hadn't been. That is, I was told it hadn't been.

Q. You saw the contract, didn't you?

A. Yes.

(Testimony of George B. Semidt.)

Q. And the contract was that $3,300.00 was to immediately be deposited with the Clerk of the Court?

A. Providing he was willing to go through with the contract as stated. Well, apparently, it wasn't done.

Q. He had signed it all right and turned it over to your Manager or President of the Columbia Lumber Company, hadn't he?

A. I don't know that. [451]

Q. Well, haven't you ever seen the contract?

A. Yes, but I don't know, I didn't see it after it was signed.

Q. You saw it after Agostino signed it, didn't you?

A. No, before it was signed I read the contract.

Q. Where did you read that?

A. Well, I don't recall where I read it. I know I read it. I knew the conditions of it.

Q. About what date was that that you read it?

A. I couldn't tell you that, I don't remember.

Q. Couldn't you tell us whether it was spring, summer or fall or what time?

A. No, I can't recall off-hand.

Q. Where did you read it; where were you when you read it?

A. I don't remember whether it was Juneau or whether it was here, I know I read it, that is all.

Q. And it had never been signed by Agostino?

A. It wasn't at the time I saw it, no.

(Testimony of George B. Scmidt.)

Q. Are you sure you didn't read it over in Mr. Butcher's office? A. No.

Q. You are positive of that? A. No.

Q. I hand you a paper that has been marked Identfiication No. 35, I will ask you to state if you have ever seen that or a similar one? [452]

A. Yes, these are payroll—these look like payroll checks. That is, they are identical to a payroll check.

Q. I will ask you to examine 36 and see if it indicates the same thing? A. That is right.

Q. Now do you notice a number on these—on each of those?

A. No, there is no number on that section of it. The number goes on the check proper, this is just an adenda to the check.

Q. Mr. Scmidt, the check then that this was attached to had the number on it?

A. That is right.

Q. Are they made out to bend back to be double?

A. That is right.

Q. You don't use a book for those, they are just printed, are they? A. With the checks?

Q. Yes. A. Yes, they are just printed.

Q. And that is what you call a voucher?

A. A voucher. We have a duplicate of that sheet.

Q. Do you have the duplicate of these other checks that you examined there? A. No.

Q. Can you tell the jury why you didn't use the

(Testimony of George B. Scmidt.)

same kind of checks to give to Mr. McCarrey that you used on these others? [453]

A. Yes, I can tell you very easily. Those checks were made here in Juneau—Anchorage and the General Account checks are only held in Juneau and we made those up when we were here in Anchorage in order to present these to give them to Mr. McCarrey to present to Mr. Agostino or his attorney.

Q. Well, they are made out on the Bank of Alaska right here in Anchorage, aren't they?

A. On the General Fund.

Q. But they are made on the Bank of Alaska, aren't they? A. That is right.

Q. And you say you used them away back when Blacky Helmer was working for you—those duplicate forms then?

A. Yes, but that is again on a revolving fund, Whittier. We have a revolving fund for every bank which is independent from entirely from the General Fund account which is controlled at Juneau and these checks that were issued were issued on a General Fund at Juneau over which the various branches have no control whatever and they don't issue any checks on it. It is only Juneau or the authorities that have the authority to sign on the Juneau General Fund that can sign those General Fund checks.

Q. Does Mr. Morgan have authority to sign them?

(Testimony of George B. Semidt.)

A. Why, certainly, he has authority to sign those.

Q. He signed those Bank of Alaska counter checks that you have seen, didn't he?

A. That is right. [454]

Q. You don't know why Mr. Morgan didn't use the regular form check for that, do you?

A. We didn't have any here and we had to do it here.

Q. And you didn't have any number on these?

A. That is right.

Q. Did you ever make a number or give them a number?

A. I don't know if the Juneau office did but they were notified of the issuance of those checks, as I recall it.

Q. As you recall it? A. Yes.

Mr. Bell: I think that is all.

The Court: That is all.

Mr. Boochever: I have one other question of the witness, Your Honor.

Redirect Examination

By Mr. Boochever:

Q. Mr. Semidt, I show you a copy of a sales agreement and ask you if it was an unsigned copy like this that you refer to——

Mr. Bell: I object to it as leading and suggestive.

The Court: Yes, the objection is sustained, telling the witness what answer to make.

(Testimony of George B. Semidt.)

Mr. Boochever: I am sorry, Your Honor, I had no intention of doing that, if I did.

Q. Mr. Semidt, you referred to Mr. Bell about seeing an unsigned copy of an agreement—— [455]

A. That is right.

Q. ——I ask you to look over this copy of an agreement to see if it is similar or like the one you saw? A. Yes, it is.

Mr. Boochever: I think I should have this marked for identification here.

The Court: It may be so marked.

The Clerk: Defendant's Exhibit M for identification.

The Court: Defendant's Exhibit M for identification.

Q. (By Mr. Boochever): Now, on the last page of this copy I would like you to look at that and ask you if that is similar to the copy you saw?

Mr. Bell: Object to that as leading and suggestive, incompetent, irrelevant and not proper redirect and it is not based upon any of the pleadings in the case and no proper foundation laid.

The Court: Well, it is leading but it may stand.

The Witness: Well, the only thing is I didn't see the signature of Bruno Agostino on it originally. It was simply blank as I recall, nor was it signed by Mr. Morgan.

Mr. Boochever: No further questions, Your Honor.

(Testimony of George B. Semidt.)

Recross-Examination

By Mr. Bell:

Q. Mr. Semidt, do you know where that pink copy came from?

A. Haven't the least idea, no. [456]

Q. You never did see that one before?

A. No, sir.

Q. Was it a short copy like that?

A. No, legal.

Q. It was legal that you saw?

A. That is right. I was looking there at the money involved.

Q. The copy you saw was on legal paper, wasn't it? A. Yes, something like that.

Q. You don't have any idea who made up that pink one there? A. Absolutely not.

Q. And that pink one couldn't be made at the same time at the typewriter as this one, could it, because the contract itself is longer than this, about two or three inches, isn't it?

A. Your guess is as good as mine, I don't suppose so.

Q. You can tell by comparing these?

A. Also you can too.

Mr. Boochever: I object to the question, it speaks for itself.

The Witness: I would say no.

The Court: It hasn't been offered in evidence.

Q. (By Mr. Bell): It couldn't be made at the same stroke of the typewriter, could it?

(Testimony of George B. Semidt.)

A. No.

Q. And you don't know where this came from?

A. No.

Q. I call your attention, Mr. Semidt, this typewritten copy that you see has the signatures typed in, doesn't it?

A. That's is right, I said I didn't see any signatures. I testified I didn't see any signatures on the copy I seen.

Q. Then it couldn't have been this one you saw, could it?

A. No, the context was probably the same but as far as the money value was concerned, that is.

Q. But the copy you saw was on legal paper?

A. That is right.

Mr. Bell: That is all.

Mr. Boochever: No further questions.

The Court: That is all. Another witness may be called.

Mr. Boochever: Your Honor, this next witness I see is in the court room here. I don't believe that he is about to testify to anything that was testified to while he was here, in fact I know it isn't, it is on an entirely different point.

The Court: Very well, he may come forward.

Mr. Bell: Your Honor, before this witness testifies, since he has been called from the floor of the court room and the rule has been required by the defendants, I must object to him testifying at all

unless I am given some right to first ask some preliminary questions.

The Court: You may ask him.

WINFIELD ERVIN

called as a witness herein, being first duly sworn, testified as follows:

Mr. Bell: Where do you live?

The Witness: Anchorage, Alaska.

Mr. Bell: When did you first hear any part of the trial in this case?

The Witness: This morning.

Mr. Bell: And you have been in the court room since the time we started this morning?

The Witness: About 25 minutes after ten.

Mr. Bell: You were here when we started putting on evidence?

The Witness: I was here. You were just finishing with Mr. Medley.

Mr. Bell: And you have been here ever since?

The Witness: That is right.

Mr. Bell: And in the court room?

The Witness: That is right.

Mr. Bell: I object to the witness testifying.

Mr. Boochever: The witness will be asked nothing in regard to any of the matters which the witness, Mr. Semidt, testified or the witness, Mr. Medley, testified.

The Court: Was the witness warned to stay out of the court room?

Mr. Boochever: No, Your Honor, I don't be-

(Testimony of Winfield Ervin.)
lieve I warned [459] this witness to stay out of the court room. I did not think he would come in.

The Court: Objection overruled.

Direct Examination

By Mr. Boochever:

Q. What is your name?

A. Winfield Ervin.

Q. What is your occupation, Mr. Ervin?

A. Manager of the Caterpillar Branch of the Northern Commercial Company, 3rd District.

Q. For how long have you been so occupied?

A. Since 1937.

Q. Are you familiar with the various models of caterpillar tractors? A. Yes, sir.

Q. Are you familiar with their values?

A. In a vague way.

Q. That is your business handling them and selling them? A. That is right.

Q. Now, approximately how old would a caterpillar tractor, model RD-7, No. 9G4602 be?

A. Well, I would say over eight years old.

Q. And how about a model RD-8, No. 1H2364?

A. Over eight years old.

Q. And now what is the normal life as far as a depreciation [460] schedule is concerned of a caterpillar tractor used in a logging operation?

Mr. Bell: I object to it unless he testifies that he knows or is qualified along that line. He might understand caterpillars well but not know the length of life of a caterpillar in a logging operation.

(Testimony of Winfield Ervin.)

The Court: Objection is sustained.

Q. (By Mr. Boochever): Are you familiar with the depreciation schedules that are usually set up for caterpillar tractors used in logging operations?

Mr. Bell: I object to that, it wouldn't be controlling in this case.

The Court: It may throw some light on it.

Mr. Bell: I object further on the theory that it is not within the pleadings, no proper foundation laid, the witness is not shown to be qualified to testify on that particular subject and for the further reason it is incompetent, irrelevant, and immaterial.

The Court: Overruled.

Q. (By Mr. Boochever): Would you answer the question, please?

A. Well, I believe it is customary for income tax purposes only to set up a depreciation schedule 4 to 5 years is allowable, as I understand, by the Internal Revenue. That doesn't necessarily [461] mean that the machine will be entirely worn out in that length of time.

Mr. Bell: Now, Your Honor, I move to strike the answer as not being responsive to the question for the further reason it is now made *it* by the answer has made itself.

The Court: Motion is granted. The answer shows that the testimony is valueless because the income tax people may have a formula all of their own which has no necessary bearing upon any—on any

(Testimony of Winfield Ervin.)

of the testimony that has been given here. Jury will disregard the answer.

Q. (By Mr. Boochever): Mr. Ervin, what would be the effect on a tractor of being immersed in salt water?

Mr. Bell: Object to that for the reason he has not yet qualified himself, that would take the chemist or someone else.

The Court: Not necessarily, but he hasn't qualified at all. Objection is sustained.

Q. (By Mr. Boochever): Mr. Ervin, are you familiar with the repair work that is done on caterpillar tractors? A. I believe so.

Q. Have you had occasion to examine tractors that were immersed in salt water?

A. Not in salt water; I have seen them immersed in mud and water. [462]

Q. And do you know what the effect would be on a caterpillar of being immersed in salt water?

Mr. Bell: Your Honor, I object to it for the reason he says he has never had any experience with one immersed in salt water.

The Court: He has asked for his knowledge.

The Witness: I believe it would be more detrimental than it would be in fresh water.

Mr. Bell: I move to strike the answer for the reason it is not responsive to the question and for the further reason there is no proper foundation laid and also that the witness has not been qualified on that specific line.

(Testimony of Winfield Ervin.)

The Court: The motion is granted. Jury will disregard the answer.

Q. (By Mr. Boochever): Would you answer just whether you know just what the effect would be in general way of immersing a tractor in salt water?

A. Yes, I know what would be the results of it.

Q. And what would the results be?

A. Well, I know it would have to be taken all apart and cleaned up immediately otherwise you wouldn't have much left.

Q. Now, taking two caterpillar tractors of the age of the two that numbers were given to you and if it were required to put $10,000.00 into those tractors to make them in a running condition so that they could be used in logging operations, [463] could you give any estimate of the value, from your knowledge of the going value of caterpillar tractors, of such tractors?

Mr. Bell: Now, I object to that for the reason it is incompetent, irrelevant, immaterial and not within the issues, no proper foundation laid, and especially there is no numbers proven and the dates of the sale of the tractors have not been proven and the tractor if setting in a dry place would not deteriorate at all. There is no showing as to the use of the tractor.

The Court: Objection is overruled.

Mr. Bell: Exception.

(Testimony of Winfield Ervin.)

Q. (By Mr. Boochever): Would you answer my question, please.

The Witness: Read the question.

(Question read.)

Mr. Bell: Your Honor, before he answers that may I state one further objection. This is a hypothetical question and is not based on all of the evidence that is before Your Honor and omits and does contain statements that are not in evidence before Your Honor, therefore, it is not proper.

The Court: You are asked whether or not you know what the value of the tractors are. Answer that question yes or no.

The Witness: No.

Q. (By Mr. Boochever): Would you know what the approximate value of tractors under the circumstances that I described there in March of 1948 would [464] have been?

Mr. Bell: I object to that for the same reasons above stated.

The Court: Overruled.

The Witness: No, I couldn't say without seeing the tractors.

Mr. Boochever: That is all.

Cross-Examination

By Mr. Bell:

Q. Mr. Ervin, tractors could be made eight years ago and not abused in operation and they would be in fair condition yet, wouldn't they?

(Testimony of Winfield Ervin.)

A. That depends on the number of hours of operation.

Q. You don't just junk it as long as it is usable, do you? A. No.

Q. And you do trade in—do you take in used tractors on new ones at times?

A. Haven't had to yet; they are pretty scarce.

Q. They are still awfully scarce yet, are they?

A. Yes.

Redirect Examination

By Mr. Boochever:

Q. Would you take in a used tractor that had been immersed in salt water for a time?

A. No.

Mr. Boochever: That is all. [465]

Mr. Bell: Now, I object to that, of course. I didn't attack it in time but I thought he had stopped his questions and Mr. Ross was talking to me and I didn't attack it, but the question is evidently just a conclusion of the witness and incompetent, irrelevant and immaterial.

The Court: Motion is denied.

Mr. Bell: Exception.

Recross-Examination

By Mr. Bell:

Q. It wouldn't hurt a tractor any to be immersed in salt water if it was taken right out and washed out and cleaned, would it?

A. I don't believe so, not immediately.

Q. And if the tractor——

(Testimony of Winfield Ervin.)

Mr. Boochever: I don't believe the witness had completed his answer.

Q. (By Mr. Bell): Do you want to say some more at your answer?

A. I said if it was done immediately.

Q. What would you say immediately—a week?

A. No, right now.

Q. Right now? And what would happen to a tractor that was put in there, it was all oiled and greased as an ordinary tractor is and it was submerged and taken out and waited a week before it was cleaned, what would happen to it?

A. That depends on how long it was immersed.

Q. Say it was immersed a week, we will give it plenty of time, what would happen to it then?

A. Just the same as would happen to any other metal, it would be ruined in salt water.

Q. The grease protects the metal, doesn't it?

A. It will for a while but not very long.

Q. Boat hulls are run through the salt water for years—steel hulls—don't they? You know that, don't you?

A. They are all painted, aren't they?

Q. Well, tractors would be greased which would even be better for it, wouldn't it?

A. You don't know that it has been greased.

Q. Oh, well, you are just assuming that it was cleaned off perfectly clean and dry and was submerged in there, are you? A. No, sir.

Q. Well, now, Mr. Ervin, if the tractor was

(Testimony of Winfield Ervin.)

taken out of the water and cleaned and was put back in use and used for a long period of time and operated normally, that wouldn't indicate that it was hurt any by this being submerged, would it?

A. Probably not.

Q. It would indicate that it wasn't hurt, wouldn't it? A. Probably so.

Q. Yes, sir. That is all. Wait just a moment. Say, you do in your line of business take old caterpillars in and recondition them, don't you? [467]

A. I did once.

Q. Well, when you get it done, was it in good working order?

A. It seemed to be. The boys who bought it were satisfied.

Q. And, approximately, what did it cost you to recondition that thing?

A. Well, this was a small model tractor, the smallest one we make, the price on that you couldn't judge by every tractor.

Q. About what would it cost you to recondition that one? We will use that just as a yardstick.

Mr. Boochever: I object to that as being irrelevant and being of no value and improper redirect.

The Court: Objection sustained.

Mr. Bell: Exception.

The Witness: I don't remember.

Q. (By Mr. Bell): What would you charge to recondition an old RD-8 caterpillar?

A. Nobody could give you that answer.

(Testimony of Winfield Ervin.)

Q. Well, you wouldn't charge over $5,000, would you, to recondition one? A. Yes.

Q. You would? Did you ever do that to anybody?

A. I just got two out of the shop that cost—a smaller model than that—that cost $7,500.00 to overhaul, and they weren't completely overhauled then. One of them was Mr. Morgan's and the other belonged to Lytle and Green. [468]

Q. This Mr. Morgan that you are testifying for now? A. Yes, sir.

Q. Mr. Morgan is a friend of yours?

A. Surely.

Mr. Bell: That is all.

Further Redirect Examination

By Mr. Boochever:

Q. Is your testimony in any way influenced by the fact that Mr. Morgan is a friend of yours, Mr. Ervin? A. Not whatsoever.

Mr. Boochever: That is all.

HERMAN H. ROSS

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bell:

Q. State your name?

A. Herman H. Ross.

Q. Mr. Ross, after you were employed in the

(Testimony of Herman H. Ross.)
case did you have a conversation with Mr. McCarrey?

A. Yes, I had a conversation with Mr. McCarrey who was present in that conversation.

Mr. Boochever: Object to that as being incompetent, immaterial, improper cross, not being——

The Court: It is not cross-examination at all. Do you wish [469] to make the witness your witness?

Mr. Bell: Yes, I will make him my witness for the occasion and save putting him back on.

Q. About what day of the year was it?

A. Mr. Bell, it was in the fall of the year. I can't say exactly when. It is probably around the 1st of September.

Q. Was that before the suit had been filed or after this suit had been filed?

A. I am not absolutely sure whether that first conversation that I had with Mr. McCarrey was before the suit was filed or not.

Q. Was Mr. Morgan present?

A. Mr. Morgan was present upon one occasion when I was present to talk to Mr. McCarrey.

Q. Who else was in there, if you know.

A. Mr. Morgan, Grigsby, an attorney in Anchorage, was with me and I don't believe Mr. Agostino was present, no. Mr. McCarrey, Mr. Grigsby and myself and Mr. Morgan—Thomas Morgan.

Q. In that conversation was there anything said about the checks being issued?

(Testimony of Herman H. Ross.)

A. I believe something was said about the checks being issued, Mr. Bell, but I never saw one.

Q. Did you see any checks of any kind?

A. No, I don't recall having seen any check at all.

Q. Did you see the contract that has been signed by Mr. Morgan? [470]

A. No, I don't recall seeing the contract——

Q. Did they make any——

A. ——that was signed.

Q. Did they make any offer to pay you any money at that time?

A. They made no offer to pay me any figure.

Cross-Examination

By Mr. Boochever:

Q. How long were you in the office there with Mr. McCarrey, Mr. Ross?

A. Oh, I would say we were in there close to 45 minutes, possibly an hour.

Q. And they told you that the checks had been issued, didn't they? A. I am not certain.

Q. You said that you thought they did a minute ago?

A. I think they did but I am not absolutely certain that they told me the checks had been issued, but I do know that Mr. McCarrey had told me about a week before—4 or 5 or 6 days before—that the contract had not been signed by Mr. Morgan.

Q. But you did know that the checks had been issued, is that right?

(Testimony of Herman H. Ross.)

A. I think something was said about the checks being issued and I cannot say definitely but I would say—my guess would be that there was talk of the checks having been signed, yes. [471]

Q. You did know, too, that Mr. Agostino had never furnished a list of that equipment or a bill of sale of the equipment, you know that, too, didn't you? A. That I don't know.

Q. You don't know that? A. No.

Q. You didn't know that at the time?

A. I don't think he did but I don't know of that of my own knowledge.

Redirect Examination

By Mr. Bell:

Q. Was there any request made by Mr. McCarrey or Mr. Morgan—Mr. George Morgan—upon you and/or Mr. Grigsby to furnish an itemized statement of that equipment in that conversation?

A. Not that I recall.

Mr. Bell: I think that is all.

Recross-Examination

By Mr. Boochever:

Q. You did know that on July 19th Mr. Morgan had written Mr. Butcher asking for such a list and telling that the agreement was all O.K. if he would just give that list, didn't you?

A. I think that letter had been written. I am pretty sure that the itemized list had been called for.

Mr. Boochever: That is all.

The Court: Another witness may be called.

The Court: Court will stand in recess until 19 minutes past eleven.

(Short recess.)

The Court: Without objection the record will show all members of the jury present, and another witness may be called.

BASIL I. ROWELL

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, sir? A. Rowell.

Q. What is your full name? A. Basil I.

Q. Are you know as Ted Rowell?

A. That is right.

Q. What is your occupation, Mr. Rowell?

A. I am engaged in the lumber business.

Q. Are you on your own in the lumber business?

A. Yes, there is a group of us have a mill down at Pelican.

Q. Is the Columbia Lumber Company in any way involved in that group?

A. No, they are not.

Q. What was your occupation in 1948?

A. I was manager of the Columbia Lumber Company at Whittier. [473]

Q. And were you in that post long?

A. Well, I held in that capacity up until I had

(Testimony of Basil I. Rowell.)

to leave there and go south last fall—early fall.

Q. Now, were you there in the spring of 1948?

A. Yes, I was.

Q. And did you see Mr. Bruno Agostino at any time during the spring of 1948?

A. Yes, I saw him several times.

Q. When was about the first time that you recall seeing him in the spring of 1948?

A. Oh, I would say it would be the latter part of March or the first part of April.

Q. Who was with you when you went to see him then? A. Mr. Lambert.

Q. Was any conversation had with Mr. Agostino at that time?

A. Well, yes, to the effect that he wasn't logging, of course.

Mr. Bell: Now, I move to strike that as not responsive to the question.

The Court: I didn't understand that.

Mr. Bell: Of course is a conclusion and not a statement of fact.

The Court: That is not important, overruled.

Q. (By Mr. Boochever): What conversation did you have with Mr. Agostino at that time, Mr. Rowell? [474]

A. Well, he was desirous——

Mr. Bell: Now, I move to strike that. He was asked what the conversation was.

The Court: Just answer your counsel's question as to what the conversation was.

(Testimony of Basil I. Rowell.)

The Witness: As regards the sale of the camp.

Q. (By Mr. Boochever): What did Mr. Agostino say in that respect?

A. He wanted to see Mr. Morgan.

Q. And what did you tell him, if anything?

A. Well, if I told him anything I told him that I would get in touch with Mr. Morgan and convey that to him.

Q. And did you or Mr. Lambert get in touch with Mr. Morgan? A. Yes, I did.

Q. What instructions did you receive to tell Mr. Agostino?

A. Mr. Morgan would be up in this part of the country shortly and he would make it a point to go down to Whittier and would go out to see him.

Q. And did you go back to see Mr. Agostino?

A. I went out there. We took a wire out to show him to the effect that Mr. Morgan would be there and would be out to see him.

Q. And was there anything in that wire to the effect that Mr. Morgan was buying Mr. Agostino's property?

Mr. Bell: I object to that, the wire would be the best evidence. [475]

Mr. Boochever: That is probably not proper foundation.

Q. Do you have that wire, now?

A. No, I don't.

Q. Do you know where it is?

A. No, I wouldn't.

(Testimony of Basil I. Rowell.)

Q. What did the wire contain?

Mr. Bell: I object to that until the original wire is accounted for and effort has been made to produce the best and this secondary evidence would not be competent until the best evidence is admissible.

The Court: As I recall, Mr. Morgan or some other testimony, I think it was Mr. Morgan testified that he did not have possession of the wire and Lambert testified that he didn't have it and so far as I can tell the way is open to supply secondary evidence of the contents. The objection is overruled.

Q. (By Mr. Boochever): What did the wire contain as near as you can recall?

A. That he would be up to Whittier and would make it a point to go out and interview Mr. Agostino.

Q. Did the wire say anything to the effect that he was buying the property of Mr. Agastino?

Mr. Bell: I object to that as leading and suggestive.

The Court: Undoubtedly is leading; objection is sustained.

Q. (By Mr. Boochever): Did you show that wire to Mr. Agostino? [476] A. Yes, I did.

Q. And what did Mr. Agostino do?

A. He said that that was all right that he was satisfied.

Q. And then, subsequently, do you know what Mr. Lambert did?

A. I don't quite understand that?

(Testimony of Basil I. Rowell.)

Q. Did he do anything in connection—what was his job there?

A. He was a contractor there.

Q. And what was he contracting to do?

A. Log.

Q. And do you know whether there was any timber purchase made in that area?

A. Yes, there was.

Q. I show you agreement here and ask you if you can identify it?

A. Yes, this is the timber contract.

Q. Would you repeat that loud enough?

A. This is the timber contract that was let for that specific piece of ground.

Mr. Bell: We object, Your Honor.

Mr. Boochever: I haven't offered it yet.

Mr. Bell: We object to him testifying to an instrument and calling it an original contract when the instrument itself shows that it is not a signed instrument at all.

Mr. Boochever: No one has testified that it is the original contract, Your Honor. [477]

The Court: There is nothing to object to yet, that I know of.

Mr. Boochever: I would like to have that marked for identification.

The Court: It may be so marked for identification. Objection to whatever effect it may be is overruled at this time.

Mr. Boochever: Your Honor, at this time I would like to suggest a stipulation to counsel that

(Testimony of Basil I. Rowell.)
might speed this trial up if he would come forward to the bench.

(Statements taken at the Bench.)

Mr. Boochever: Your Honor, strictly speaking, this witness probably is not capable of introducing this in evidence. We can recall Mr. Morgan for that purpose. We have just secured this copy of the agreement from the Juaneau office but it is the true copy of the original agreement which is in the Forest Service office. Of course we can have Mr. Morgan recalled, if they want, to state that this came through his regular office records and is a true copy, otherwise, if the counsel is willing to stipulate that it is a copy of the agreement then it will be unnecessary to call Mr. Morgan for that purpose and speed the trial up accordingly.

Mr. Bell: We will not agree to that because it is not a certified copy; it isn't signed.

The Court: It wasn't——

Mr. Boochever: Your Honor, we just secured it from the [478] mail and asked for the only copy that was in Mr. Morgan's office and that is the only one he has and has had any control over.

The Court: Well, counsel refuses——

Mr. Bell: We refuse to stipulate.

Q. (By Mr. Boochever): You testified, I believe, that you showed Mr. Agostino a wire saying that Mr. Morgan would come up?

A. That is right.

(Testimony of Basil I. Rowell.)

Q. Did Mr. Morgan subsequently come up to Barry Arm? A. Yes, he did.

Q. When was that?

A. Right close to the middle of April, maybe a few days before, I am not exactly sure of the date but it was awfully close to the middle of April.

Q. When Mr. Morgan came up did you go out to see Mr. Agostino? A. Yes, he did.

Q. Who was present at that time?

A. I went out with him and we met Mr. Lambert out there and the three of us went down to Bruno's camp.

Q. And did any conversation take place between the plaintiff, Mr. Agostino, and Mr. Morgan, Mr. Lambert and yourself? A. Yes.

Q. What was the conversation?

A. We looked over the equipment at first and then we all sat down on a log on the beach and Mr. Morgan asked Mr. Agostino [479] what he wanted for the camp and equipment.

Q. And what did Mr. Agostino say?

A. Said he wanted $19,000.00.

Q. And what did Mr. Morgan reply, if anything, to that?

A. He told him that that price was too high, that the company wouldn't be interested at that figure.

Q. Was any further proposition made?

A. Yes, I heard Mr. Morgan say something about leasing it.

(Testimony of Basil I. Rowell.)

Q. Did Mr. Agostino agree to that?

A. No, he did not want to lease it; he wanted to sell.

Q. Was any agreement made at all between Mr. Morgan and Mr. Agostino at that time and place?

A. Not at that time, no.

Q. Then was anything said in regard to Mr. Morgan coming back in two days or anything of that nature? A. Not that I know of.

Q. And were you present when Mr. Morgan was talking to Mr. Agostino?

A. I was there, yes. We went out on the row boat to get out to the big boat outside.

Q. Did you have any occasion to talk to Mr. Agostino yourself when Mr. Morgan and Mr. Lambert were not present?

A. Yes, I talked to him a little bit, seeing that I knew him I always did when I went up there.

Q. What, if anything, did he say to you at that time? [480]

A. Just that he was desirous of *seeling* that he wasn't logging himself and couldn't get anyone to log with him.

Q. And did he have anyone there at that time setting up a logging camp or doing anything toward logging? A. No.

Q. Were there any preparations being made at all to log? A. No.

Q. And when you were there around the end

(Testimony of Basil I. Rowell.)

of March were there any preparations being made at that time about logging men being sent out?

A. No.

Q. What did Mr. Lambert—did Mr. Morgan give Mr. Lambert any instructions with regard to Mr. Agostino's property?

A. I heard him tell him not to touch anything.

Mr. Bell: Now, I didn't get to state my objection. I object to what statements Mr. Morgan made to Lambert unless it was in the presence of the plaintiffs or one of them.

The Court: Overruled.

Q. (By Mr. Boochever): What was your answer to that question?

A. I heard him tell him not to use any of the equipment, not to touch any.

Q. Of Mr. Agostino's?

A. That is right.

Q. Now, where did Mr. Lambert set up his logging camp, are [481] you familiar with where he set it up?

A. When he first moved in theree he left the camp on the floats for a short period of time and then he went just up a little way from the head of the bay for a very short period.

Q. By the way, would that be the same area that could possibly be referred to as a pond?

A. That is right.

Q. Is that salt water in there? A. Yes.

Q. Tide water? A. That is right.

(Testimony of Basil I. Rowell.)

Q. Now, Mr. Rowell, prior to the time that Mr. Morgan—Mr. Rowell, did you ever have any occasion to get in touch with the United States Marshal here in Anchorage?

A. Yes, I did, I called him.

Q. What did you ask the Marshal, if anything?

A. I asked him if he could go out to the camp and explain to Mr. Agostino just what it was so that the men would be safe around there. I had a complaint from there and that is why I called—on the strength of that complaint.

Mr. Bell: I move to strike as hearsay—of people making complaints and so on.

The Court: Motion is granted and the jury will disregard that part of the answer. [482]

Q. (By Mr. Boochever): Just what you told the Marshal and not what anyone else told you?

A. I told him that things were very unsettled out there and the men didn't feel safe and I would like him to go out and explain to him that they had a right to be there.

Q. By "be there" what did you mean?

A. I meant Barry Arm.

Q. Did you mean on Mr. Agostino's——

Mr. Bell: I object to leading the witness.

Mr. Boochever: I am sorry.

Q. Now, Mr. Rowel, did you tell anything further to the Marshal at all?

A. No, I didn't.

Q. Did you ever make an attempt to get Mr. Agostino out of there by the Marshal?

(Testimony of Basil I. Rowell.)

A. Definitely not.

Q. Now, at the time Mr. Morgan and you and Mr. Lambert were present did you have occasion to examine the caterpillar tractors which Mr. Agostino claimed to own at that time?

Mr. Bell: I object to him having an occasion to do something, that is not a fact.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Did you examine the caterpillar tractors? A. I did. [483]

Q. What was their condition?

A. Very poor.

Mr. Bell: I object to that unless he is qualified as an expert on that line.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Have you been in the logging business for a long time, Mr. Rowell?

A. I haven't been in the logging business, no. I have been connected with it but not what you would call in it.

Q. Have you been connected with it for a long time? A. Yes, I have.

Q. In what capacities?

A. Through being a sawmill man.

Q. Are you familiar with logging equipment?

A. Yes.

Q. Have you examined it on a number of occasions?

A. I have been through quite a number of camps.

(Testimony of Basil I. Rowell.)

Q. And are you familiar with caterpillar tractors?

A. I have never worked on them directly but I have ordered an awful lot of parts for them.

Q. And did you examine these caterpillar tractors?

A. I was with Mr . Lambert, we did it together.

Q. And did you make any estimate with Mr. Lambert as to the amount of parts and so forth it would take and repairs to put [484] them in working condition for logging operations?

A. Yes, we did. The reason I went with him was because I thought he was qualified to do so much more than I was.

Q. What estimate——

Mr. Bell: I object to that. The estimate would be the best evidence if one was made and this witness admits that Mr. Lambert was the man qualified to make the estimate.

The Court: He may speak of his own knowledge. Overruled.

Q. (By Mr. Boochever): What estimate did you make? A. $10,000.00.

Q. And what was the condition of those tractors?

Mr. Bell: I object to that, he has shown that he is not an expert on caterpillars and would not know.

Q. (By Mr. Boochever): What was the condition of those caterpillar tractors at that time and place? A. Very poor.

(Testimony of Basil I. Rowell.)

The Court: Objection is overruled.

Q. (By Mr. Boochever): Now, Mr. Rowell, have you ever evaluated caterpillar tractors and known what their purchase price were?

A. The company purchased one in Whittier and I saw numerous lists where they were listed for sale.

Q. And their prices? [485]

A. The prices ranged anywhere from about $2500.00 up to, it all depended on their condition.

Q. What would you estimate the value of those two caterpillar tractors as they sat there in March of 1948?

Mr. Bell: I object to that for the reason he has specifically shown himself disqualified to estimate values.

The Court: Objection is sustained.

Q. (By Mr. Boochever): What other equipment was there, Mr. Rowell?

A. Well, there was a hoist there—an International hoist.

Q. And what was its condition?

Mr. Bell: I object to that, that is just a conclusion—what was its condition—that would be just a conclusion of the witness.

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): What was its condition?

A. It was in fairly good condition except for one main driveshaft which was bent.

(Testimony of Basil I. Rowell.)

Q. Was it a type of hoist or donkey engine that would be well fit for logging in that area?

Mr. Bell: I object to that, he has said he is not a logging man, he is a mill man.

The Court: He hasn't shown himself qualified to pass upon [486] logging. Objection is sustained.

Q. (By Mr. Boochever): Are you familiar enough with the equipment used in logging to know what a good type donkey hoist engine would be for logging operation?

Mr. Bell: I object to that for the reason that he has stated positively that he is not——

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Are you familiar enough with the logging business to know what would be a good type of donkey engine there for use in logging operations? A. Yes.

Mr. Bell: I object to that for the same reasons above stated.

The Court: Overruled.

Mr. Bell: Move to strike the answer.

The Court: Motion is denied.

Q. (By Mr. Boochever): In regard to that donkey engine hoist, what was it in regard to logging operation, was it a good type for it?

Mr. Bell: I object to that. It would be purely a conclusion. He admits that he is not a logging man in any way.

The Court: He claims now he is qualified. The objection [487] is overruled.

(Testimony of Basil I. Rowell.)

The Witness: Well, no, it wouldn't, it would be all right in my estimate—it would be all right for pond work, light work, but it was not suitable for heavy logging.

Q. (By Mr. Boochever): What would be its value to a logging concern?

Mr. Bell: I object to that; it is not shown—the value.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Do you know what the value of that type of machine would be?

Mr. Bell: I object to that for the reason he has testified he is not familiar with the values and to go at it in another way would be incompetent, irrelevant and immaterial and not within the issues, no proper foundation laid.

The Court: The objection is overruled.

Q. (By Mr. Boochever): Would you answer the question, please?

A. We made up a unit at the plant to send out there to do the work which this same donkey could have done.

Q. And how much did that cost to make up?

Mr. Bell: I object to that for the reason it is incompetent, irrelevant, and immaterial and not within the pleadings and has no purpose whatsoever in this lawsuit.

The Court: Objection sustained. [488]

Q. (By Mr. Boochever): What would be the

(Testimony of Basil I. Rowell.)
value of that donkey engine Mr. Agostino claimed to a logging outfit?

Mr. Bell: I object to it for the same reason.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, I believe we have qualified him to testify as to the value.

The Court: He hasn't testified yet that he knows what the value is or that he has not any experience which would qualify him to know the value of a donkey engine.

Q. (By Mr. Boochever): Have you had occasions to evaluate donkey engines suitable for logging operations?

A. We made up a unit to send out there to handle the logs and the riders in the log pond.

Q. What would the value, would you answer my question if you do know, what the value would be of that type of an engine?

Mr. Bell: I object to that. He has already disqualified himself by his testimony.

The Court: He has qualified himself against so this time he is qualified. Overruled.

Q. (By Mr. Boochever): What would the value be to a logging outfit?

A. The unit we sent——

Q. Not the unit we sent. [489]

The Court: The question is—Do you know what the value of the Barry Arm Unit is?

The Witness: $500.00.

Mr. Bell: I move to strike his answer as an endeavor to impeach one of their own witnesses who

(Testimony of Basil I. Rowell.)

said that he would hate to give over $3500.00 for it.

The Court: Motion is denied.

Mr. Boochever: And I question as far as the testimony is concerned whether that is it.

The Court: That is a matter addressed to the jury; they must know what the testimony is. The Court is not permitted to tell them what the testimony has been.

Q. (By Mr. Boochever): Was there any other equipment out there that you saw?

A. There were some buildings.

Q. What buildings were there?

A. There was one main building—frame building and then a shop—combination shop with a leanto on one end for a caterpillar and a cabin.

Q. How far was the cabin from the main building?

A. Oh, off-hand I would say about fifty yards possibly.

Q. Now, was there any other equipment there?

A. There was an old No. 3 American sitting up on the bank.

Q. What is an old No. 3 American, what do you mean by that?

A. A portable sawmill unit. [490]

Q. Are you familiar with sawmill units?

A. Yes.

Q. Are you familiar with their values?

A. Yes.

(Testimony of Basil I. Rowell.)

Q. Have you been in that business a long time?

A. Yes, I have.

Q. What was the condition of this International sawmill unit? A. Not very good.

Q. Can you describe its condition to the jury?

A. Yes. It was just mounted on a wooden frame. It was a very small unit suitable for handling peewee logs only and not the general run of logs which you get from a camp. And it had been sitting out in the weather. There was no protection over it and the condition was very bad.

Q. Was it set up so that it could operate at the time? A. No.

Q. What would you say its value was at that time and place?

A. Well, from my personal viewpoint I wouldn't say it had any.

Q. Would it have any value to a logging company?

Mr. Bell: Now, I object to that, that would not be the question here.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Would it have any value to a sawmill company? [491] A. No.

Mr. Bell: I object to that.

The Court: The answer may be stricken; witness is instructed not to answer until counsel has at least a reasonable chance to object. And the objection is sustained.

(Testimony of Basil I. Rowell.)

Q. (By Mr. Boochever): Would it have any reasonable market value in the general market?

A. No.

Q. Now, you testified that Mr. Morgan gave Mr. Lambert instructions in regard to Mr. Agostino's property not to use any of the equipment. Now, were any changed instructions ever given in that regard?

A. Not to Mr. Lambert, to my knowledge, no.

Q. Did you ever relay any instructions in that regard at any time?

A. Yes, but the only thing I did was to relay instructions not to touch anything at that time.

Q. And, then, subsequently, did you ever relay any other instructions? A. Yes, I did.

Q. When was that?

A. Oh, I would say it was in the latter part of July or along way late-summer.

Q. What instructions did you give then? [492]

A. I sent out word that a deal had been made to purchase the property and as of that time they could use the things that were there.

Q. And did you give any instructions in regard to the two caterpillar tractors?

A. To put them in operating condition.

Q. Do you know whether anything was done to follow out those instructions?

A. Yes, the foreman there he made frequent visits into camp and into the headquarters at Whittier and he said that——

(Testimony of Basil I. Rowell.)

Mr. Bell: I object to what he said.

Q. (By Mr. Boochever): What he said would be hearsay, Mr. Rowell, just tell what was done.

The Court: What you know was done of your own knowledge and not what somebody else told you.

The Witness: I know there was considerable work done. We could tell that by the payroll that came into the office.

Mr. Bell: I move to strike his answer because that would purely be hearsay—payroll.

The Court: Objection is sustained and the motion is granted and the answer stricken.

Q. (By Mr. Boochever): Did you have occasion your self to do anything in regard to fixing up those tractors? [493] A. No.

Mr. Bell: I object to what occasion he would have.

The Court: Overruled.

Mr. Bell: Move to strike the answer.

The Court: The use of the word "occasion" should be omitted entirely. To ask the witness if he had occasion means precisely nothing. Ask him whether he did anything.

Mr. Boochever: Very well, your Honor.

Q. Did you ever order any equipment for those tractors?

A. I ordered parts for them, yes.

Q. And did you prepare payrolls or authorize payrolls to pay mechanics in that regard?

(Testimony of Basil I. Rowell.)

Mr. Bell: I object to that as being incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: Yes, I did.

Q. (By Mr. Boochever): And do you know approximately how much was expended on the repair of those two tractors?

Mr. Bell: I object to that for the reason that the payrolls and the orders would be the best evidence.

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Would you answer the question? [494] A. Well, yes, I did.

Q. Approximately how much?

Mr. Bell: I object to that for the same reason.

The Court: Overruled, you may answer.

The Witness: Over several hundred dollars.

Q. (By Mr. Boochever): What was that for?

A. That would be for parts.

Q. And how about in regard to work done on them?

A. The work done on them would amount to quite a bit more.

Q. How much would you say was spent by Columbia Lumber Company on those two caterpillar tractors, if you know?

Mr. Bell: I object to that; that would purely be a guess and a conclusion.

The Court: Answer, if you know; if you don't know say so.

(Testimony of Basil I. Rowell.)

The Witness: I don't know that.

Mr. Boochever: If there is no objection I will have these marked as one for identification.

The Court: That is right. They may be so marked.

Q. (By Mr. Boochever): I show you Defendant's Exhibit "O" for identification and ask you if you can identify these slips of paper?

A. Northern Commercial invoices.

Q. Did they go through your office at Whittier?

A. Yes, they did.

Q. And you have seen them there?

A. Yes, I have.

Q. What do they represent payments on? Look them over carefully and then answer.

Mr. Bell: I object to them unless it is shown that they had something to do with this particular property.

Mr. Boochever: That is obviously what we are trying to find out.

The Court: Overruled.

The Witness: Yes, those are all caterpillar parts.

Q. And for what tractors were those parts ordered?

A. Well, I couldn't say definitely because the numbers are altogether and I couldn't differentiate one from the other. There were several things ordered and I don't know definitely that they were for one machine or the other.

(Testimony of Basil I. Rowell.)

Q. Were they for Columbia Lumber Company tractors or do you know whether they were for the Columbia Lumber Tractor D-7 that they had before dealings with Agostino?

A. I would say they weren't.

Q. Do you know for what two tractors they were for?

A. There were only three tractors there—there was a new one and the two old ones.

Q. By the "two old ones" you mean the tractors that you saw at Agostino's place in March? [496]

A. That is right.

Mr. Boochever: At this time I wish to offer these bills in evidence as Defendant's Exhibit "O."

Mr. Bell: We object to them for the reason they are incompetent, irrelevant and immaterial, not properly identified and not shown to have anything to do with this lawsuit or it is not within the pleadings of the case.

The Court: The witness under leading questions testified that they did have something to do with it and therefore they are admitted.

Mr. Bell: Exception.

The Court: They may be read to the jury. Do counsel care to stipulate they may not be read now and they may be read by counsel on either side at any time?

Mr. Boochever: If counsel would stipulate I would like to read the summary of amounts.

(Testimony of Basil I. Rowell.)

Mr. Bell: If you are going to read you had better read it all.

Mr. Boochever: "Northern Commercial Company—" Do you want me to read the print on the heading of the paper?

Mr. Bell: No, you need not read that but I would like you to read the date.

Mr. Boochever: "September 4, 1948, sold to Columbia Lumber Company, Whittier, Alaska. Ship to: Same, Camp No. 1, Whittier, Alaska. Cat. Parts: R.B. two 2F5566 Roller Assembly, [497] $38.60 each $77.20; two 1F7930 Roller Assembly, $26.75 each $53.50; twenty 7B7453 Teal. (7B453) ext. tax, $4.50 each $90.00; four 6B7115 Bracket Assembly $26.40 each $105.60. Total $326.30. Paid, Ross.

"July 17, 1948. Sold to Columbia Lumber Company, Whittier, Alaska. Cat Parts. R.B. One-hundred 1A1493 Bolts 20-cents each $20.00; one-hundred 1B4433 Nuts 10-cents each $10.00; one-hundred 3B4510 L. washers 02-cents each $2.00; six 7B2438 shoes 22″ $9.55 each $57.30. Total $89.30. Camp I.

"7/14/48. Sold to Columbia Lumber Company, Whittier, Alaska. Cat. Parts. Harb. two 3B551 diesel plug 20-cents each 40-cents; four 7B2438 granser $9.55 each $38.20; one-hundred 1A1493 bolt 20-cents each $20.00; one-hundred 3B4510 L. washers $1.90 c; one-hundred 1B4433 nuts $8.70 c. Total $69.20. Camp One. Charge. Thomas A. Morgan.

"8/20/48. Sold to Columbia Lumber Company,

(Testimony of Basil I. Rowell.)

Whittier, Alaska. At Camp No. 1. Twenty-four 4A332 Elements $1.30 each $31.20; six 3B8998 Fittings. Fittings B.O. from Fairbanks. J.C.

"8/18/48. Sold to Columbia Lumber Company, Whittier, Alaska. At Whittier, Alaska. Cat Parts. Harb. Two 2B6087 forks $6.15 each $12.30; four 2B6043 Rings $2.80 each $11.20; two 2B6109 nuts. Total $23.50. One axle assm. for D-7 Arch Hyster. Shorts have been B.O. from Fairbanks."

Q. Now, you testified that you gave instructions for them to repair those tractors. Subsequently, did you give any further [498] instructions in regard to those tractors?

Mr. Bell: I object to any further testimony along that line because it would not be binding upon these plaintiffs what he would tell his employees—it would not be binding on these plaintiffs.

The Court: Overruled.

Q. (By Mr. Boochever): Would you answer the question, please? A. Yes, I did.

Q. What instructions did you give in that respect?

Mr. Bell: Same objection.

The Court: Same ruling.

The Witness: I gave instructions later on to give everything back that was found.

Q. (By Mr. Boochever): Now, when did you leave the services of the Columbia Lumber Company? A. September 1st.

Q. And are you connected in any way with the Columbia Lumber Company at the present time?

(Testimony of Basil I. Rowell.)

A. No, I am not.

Mr. Boochever: No further direct examination, Your Honor.

The Court: It is now twelve o'clock. I think we had better suspend, if there is no objection we will resume the trial at 1:30. Is there any objection from the members of the [499] jury to coming back at 1:30? Please remember the hour, then, ladies and gentlemen. We are adjourned until 1:30.

You will remember in the meantime not to discuss the case among yourselves or with others and not to form or express an opinion until the case is finally submitted to you.

Mr. Davis: If the Court please, on Friday we offered as exhibits the Amended Complaint in one case and the Third Amended Complaint in another of files in this Court and we agreed that we would present copies of those complaints in lieu of introducing the file. Now, insofar as the Grasser suit is concerned we have furnished a copy and the clerk and I have compared it with the original and at this time I believe it is in order to substitute that copy for the original file in the Grasser case.

Insofar as the Ellamar case is concerned, Mr. Ross presented us with a copy of the complaint but the complaint is not filled in as to dates or signatures and does not have attached to it the Exhibit A—the Conditional Sales Contract. And I think the Clerk and I have compared the copy as given and found it correct insofar as it goes.

(Testimony of Basil I. Rowell.)

Mr. Bell: Is that the Third Amended Complaint?

Mr. Davis: Third Amended Complaint.

Mr. Bell: We agreed the copy of the contract could be taken from the original complaint and attached to this copy.

Mr. Davis: That is acceptable with me. [500]

The Court: That is acceptable with me. Very well, the Clerk is authorized to detach the copy of the contract or agreements attached to the original complaint—to the Third Amended Complaint—which will go into evidence here and fill in whatever may be missing from it.

Mr. Davis: Fill in the missing dates.

The Court: And signatures and so on and anything of that kind that is missing so it will be a true copy of the Third Amended Complaint plus the copy of the contract or agreement which should have been attached to it in the first instance.

Mr. Bell: That is right. We agree to that.

The Court: Without objection then it is so ordered and these instruments will be considered in evidence, as appropriate exhibits under the numbers given to them originally.

(Whereupon, at 12:10 p.m., the trial was continued until 1:30 p.m., the same day.)

Afternoon Session

The Court: We will proceed with the trial of the case of Agostino and Socha Versus Columbia

(Testimony of Basil I. Rowell.)

Lumber Company. The Clerk will call the roll of the jury.

(Names of members of the jury were called and responded to.)

The Clerk: They are all present, Your Honor.

The Court: Is the direct examination concluded?

Mr. Boochever: Yes, Your Honor.

The Court: Counsel for plaintiff may examine the witness.

Cross-Examination

By Mr. Bell:

Q. Mr. Rowell, where is your lumber operation now? A. Pelican.

Q. Where is that?

A. That is on the northern end of Baranoff Island.

Q. And you left the employment of the Columbia Lumber Company in September, 1948, did you?

A. That is right.

Q. Was that the first—I believe you stated September 1st, 1948? A. Yes.

Q. You examined this paper which has been marked Exhibit "O" did you not?

A. Yes, I looked at the sheets and made the statement that they were N. C. invoices. [502]

Q. Now, do you know whether or not those were ordered for a DC-7 or a—I mean an R.D. 7 or an R.D. 8 or a D.7 or D.8?

(Testimony of Basil I. Rowell.)

A. The only way that can be verified is by checking numbers.

Q. And you don't know how to do that by checking these?

A. I would have to have the original order and all the records in order to do it.

Q. And you don't have those? A. No.

Q. So you don't know what part of these orders were made for the caterpillars that had formerly belonged to the plaintiffs in the case?

A. Mr. Gilbert told me that.

Q. Don't tell me what somebody told you. Do you know yourself what part of them were for the two cats that formerly belonged to the plaintiffs in this case or whether it was for some other cat?

A. Well, from my own observation I would say that it was for the old ones because the other one was brand new. It did not need all those parts.

Q. Do you operate other caterpillars belonging to the Columbia Lumber Company in other camps?

A. There was one other.

Q. But you had some other camps operating, did you not, operating? A. Yes. [503]

Q. How many other camps did you have operating at that time?

A. There was one in at Montague Island. He was an independent contractor.

Q. Did he have caterpillars there?

A. Yes.

Q. How many did he have?

(Testimony of Basil I. Rowell.)

A. I am not sure. I never visited. I know it was two, possibly three. I never went to the Island.

Q. What other camp did the Columbia Lumber Company own or operate at that time?

A. They didn't operate those. That was a contractor.

Q. Well, they furnished the equipment at Barry Arm. You helped take the equipment in for that one, didn't you. A. We sent it out there, yes.

Q. Well, it was your equipment, wasn't it?

A. Yes, the equipment belonged to the company and was worked out with the contractor.

Q. Now, then, did you do the same way with any of the other camps?

A. Well, they had their camps running when I took over the job as manager and that I couldn't say because their equipment was already there and I really don't know who had purchased them originally.

Q. Now, then, the parts that you ordered for various cats, you would order them through the Northern Commercial Company, would [504] you?

A. That is right.

Q. You had about four or five other cutters in the woods, did you not—other camps in the woods cutting logs—or maybe more than that, how many did you have?

A. No, there was Kings Bay, that was part of the same contract as Montague, that is, one man

(Testimony of Basil I. Rowell.)

had his camp divided into two separate camps but it was under one contract. The other men we got logs from were men who had logs to sell and we just bought their logs.

Q. Did you order groceries and repairs for all these other people, too?

A. For this one man, yes.

Q. You did for the other camps, did you not?

A. That is what I mean, the man who had Montague Island and Kings Bay.

Q. What was the number of this camp at the mouth of Mosquito Creek? A. Camp One.

Q. Now, where was Camp Two?

A. Montague.

Q. Where was——

A. I will change that. Camp One was Kings Bay and Montague was Camp Two.

Q. Where was Camp Four? [505]

A. We didn't have one.

Q. You don't have any idea whether you ordered these things for someone else or for the mouth of Mosquito Creek?

A. When I ordered them from the office for the different camps I always designated on there where they were for—Camp One or for Trobridge.

Q. And if they were for Camp One when would you mark that on—when you made the order—at the time you made the order? A. Yes.

Q. You wouldn't mark it on later at any time?

(Testimony of Basil I. Rowell.)

A. I would put that on when the order was put in.

Q. And these are carbons and it would show?

A. No, I did not make those. Those are N. C. invoices.

Q. But the order you would make you would have it marked Camp One, Camp Two or Camp Three?

A. I would have it returned in that way, yes.

Q. So you don't know of your own personal knowledge where this equipment went to that you ordered here, do you?

A. Well, the equipment came in. I checked it over with our original order. That is how I knew where it was to go.

Q. And you never saw it any more after it came to you at Whittier?

A. I would send it out to the camp, wherever it was ordered for.

Q. There are two of these that are marked Camp One. It seems [506] to be the only two that are marked in the original invoices as Camp One, can you check there and see if there is any more than this one dated September 4, 1948? And, then, I believe there is another one there, isn't there, I believe, marked Camp One? Now, that one, that is marked Camp One, that is 8-20-48, isn't it?

A. Yes.

Q. Is there any more marked Camp One?

A. Well, no, they didn't mark them all when

(Testimony of Basil I. Rowell.)

they made out the invoices, and most of the——

Q. The others, then, don't have the Camp One mark on——

A. No, they didn't always do it—the N. C. Company didn't.

Q. Some of those could have been ordered though, of course, for other camps? A. Yes.

Q. Did you ever see the tractors any more after——

Mr. Boochever: Excuse me. I wish to object to that question as being hypothetical and conjectural to prove what happend.

The Court: Objection denied.

Q. (By Mr. Bell): Did you ever see the caterpillars after April 10, 1948?

A. No, I did not go up into the woods—back into the woods.

Q. And from that date on you don't know of your own personal knowledge what happened to the cats other than what people told [507] you, do you?

A. What the foreman of the camps told me.

Q. On the day that you were there sitting on the log with Mr. Morgan and Mr. Agostino and Mr. Lambert, the price that you understood the price to be—$19,000.00? A. That is right.

Q. Now, could you be mistaken about that and it was $19,000.00 for the equipment and machinery and $6,000.00 for the buildings.

A. No, the question I heard was just "what do you want for everything—for the campsite and

(Testimony of Basil I. Rowell.)

everything?" The only quotation I heard was $19,000.00.

Q. Now, when you first went there with Mr. Lambert it was in March, wasn't it?

A. Latter part of March, I think.

Q. And was there snow on the ground at that time? A. Yes.

Q. Pretty heavy snow there, I believe, isn't there, in that valley?

A. Well, most of the time, about that time.

Q. How near the shore did you pull up with your boat at that time?

A. The water is quite deep there, you can get in fairly close.

Q. How near were you to Bruno Agostino's camp? A. You mean his cabin? [508]

Q. Well, no, his regular camp?

A. We were right there that time I went out with the wire, yes.

Q. I mean, how close did you get your boat up to the camp?

A. Oh, off-hand I would say we went 150 yards —200 yards, something like that.

Q. Did you anchor out in the sea or did you go ashore with your big boat or pull up to a wharf?

A. We went ashore in a row boat.

Q. And you left the large boat anchored outside? A. That is right.

Q. Did you leave someone on the boat?

A. Yes, we didn't have the boat ourselves.

(Testimony of Basil I. Rowell.)

Q. You had just chartered a boat for the occasion, had you? A. Yes.

Q. When you went in that time you went on ashore with your small boat, and where did you first see Bruno when you got ashore?

A. Well, I noticed that any time we went out there he would see you coming and he would walk down to meet the boat.

Q. And he met you on the bank down at Mosquito Creek?

A. Right there or shortly afterwards.

Q. Was it high tide or low tide?

A. I don't remember.

Q. On that occasion, Mr. Lambert and you were the only two [509] in the boat that went ashore, weren't you—the little boat?

A. I don't recall whether we rowed ourselves *our* whether the boatman took us in and went right back—sometimes we do and sometimes we don't.

Q. When you talked to Bruno did you go up to the camp—to the log camp there?

A. No, not at that time.

Q. Just talked on the bank of the creek?

A. Yes.

Q. And would you please tell me what you said to Bruno and what Mr. Lambert said and what Bruno said to you?

A. Well, at that time the purpose of our visit was to take out word that Mr. Morgan would go out to see him when he came to Whittier.

(Testimony of Basil I. Rowell.)

Q. I am asking you about the first time in March—first time in March; you were there two or three times in March with Mr. Lambert, weren't you? A. No.

Q. You were there only once?

A. Only the once.

Q. And that time was when you took the telegram? A. We took a telegram out there.

Q. And you told Mr. Agostino that what Mr. Lambert had said—what you had said what Mr. Lambert had said what Mr. Morgan had said in the telephone conversation, did you? [510]

A. No, I don't recall—I had this wire. I showed him the wire to the effect that Mr. Morgan would be there and read him the wire.

Q. What was the purpose of going out at that time?

A. Mr. Lambert said that something was going to have to be done because he didn't feel safe or any of the men because they had been threatened.

Q. You made some arrangement with Bruno so you could land your equipment there?

A. So the men would feel safe in working there.

Q. That was after you had talked to the United States Marshal, was it? A. Yes.

Q. What Marshal did you talk to or what Deputy did you talk to?

A. I forget his name. It was in Anchorage.

Q. Here in Anchorage? A. Yes.

Q. And you talked with him on the telephone?

(Testimony of Basil I. Rowell.)

A. Yes, I did.

Q. And he told you, I believe, you would have to get a warrant out if you wanted him arrested, that he had a right there?

A. He said I would have to have a warrant and I didn't want to do that. [511]

Q. What did you want him to do—to come out there and remove Bruno?

A. I wanted him to explain to him that these men had a right to be over there working so they would feel safe.

Q. And he told you that he wouldn't do that, that was a civil matter?

A. He wanted, like you say, he asked for a warrant and I didn't want to do that.

Q. Now, did you do that at the instance and request of Mr. Morgan?

A. No. I did that at the request of Mr. Lambert.

Q. Mr. Lambert? A. Yes.

Q. You are sure of that—it was Mr. Lambert who had you call the United States Marshal?

A. It was Mr. Lambert who came in and had me call him. He said that something definitely had to be done because neither he or the men felt safe.

Q. Nobody was down there at that time—there was nobody there? A. Oh, yes.

Q. I thought you told me it was in March that you made that trip down there and showed him the telegram, wasn't it?

(Testimony of Basil I. Rowell.)

A. It was either the end of March or the first part of April.

Q. And you testified that your trip down there was after you had talked to the United States Marshal; now you didn't have any [512] men there until you showed the telegram to Bruno and he said "You can land your men and come ashore," did you?

(No response.)

Q. You never had any men there until Bruno consented for you to come there?

A. There were men there in the latter part of February.

Q. Where? A. In their own camp.

Q. Where? A. On the float.

Q. That float was in a bay several miles from there, wasn't it?

A. The float was right where they rafted the logs.

Q. In that Mosquito Creek bay? A. Yes.

Q. Are you sure of that?

A. The camp was left and they were towed in there on floats and it was left there for sometime until they got a chance to move it up.

Q. You know that there was no camp there when you landed there the day with the telegram?

A. Mr. Lambert had come in to me with the complaint.

Q. Mr. Lambert had been back and forth several times to the mouth of Mosquito Creek?

(Testimony of Basil I. Rowell.)

A. Yes, frequently. [513]

Q. And your camp was in a bay away from there and had to be towed into the mouth of Mosquito Creek? A. Yes, that is right.

Q. Now, just to refresh your memory, not to try to confuse you at all, Mr. Rowell, the day you went in there with the telegram your camp wasn't yet in that point, it was at the bay, wasn't it?

A. He had men working around there.

Q. It was in Hobo Bay, wasn't it?

A. Hummer Bay.

Q. And how far is Hummer Bay from the mouth of Mosquito Creek?

A. Possibly 10 or 12 miles, something like that.

Q. And that is across country quite a distance in that country? A. It is by water.

Q. By water it is that far? Now, then, after you came in do you know how long it was before the camp came in—the barges with the camp and all the equipment on them was pulled in there and fastened to the shore?

A. They went in there, as I recall, somewhere around the latter part of March—1st part of April.

Q. They did that—24th or 25th or 26th of March.

A. It was around right in toward the latter part of March.

Q. And the day you showed him the telegram was the 24th of [514] March?

A. I didn't say it was the 24th.

Q. I am asking if it wasn't?

(Testimony of Basil I. Rowell.)

A. I didn't say for sure, my knowledge it was about the end of March or the 1st of April. It was only a short time before I went out there with Mr. Morgan.

Q. And your purpose for going in there with this telegram for Mr. Morgan was to appease Mr. Agostino so that you could start operations there?

A. That is right, on a complaint from Mr. Lambert.

Q. Now, you, up to that time then you hadn't started any operations there, had you?

A. Just the usual spring proposition.

Q. But you didn't have any men there, did you?

A. Mr. Lambert was up there, I believe, in February sometime. He had two or three men with him.

Q. You mean that Mr. Lambert was up there cutting timber or doing anything like that?

A. Oh, no.

Q. He was——

A. He was up at Hummer Bay.

Q. In Hummer Bay, that is what you are referring to all the time, isn't it? A. No.

Q. Now, where was the camp then on the 24th day of March, [515] 1948, was it in Hummer Bay or was it in the mouth of Mosquito Creek?

A. I have no way of knowing.

Q. The fact that you went there and landed and talked to Agostino and showed him the telegram, you still wouldn't know whether the camp was there or not?

A. I know it was sometime before I went up

(Testimony of Basil I. Rowell.)
there with Mr. Morgan that all this took place and that is why I said about the end of March or the 1st part of April.

Q. The date that Mr. Morgan went there was the 10th of April or approximately?

A. About the middle of April.

Q. But you were down there before you delivered the telegram to Mr. Agostino? A. Yes.

Q. And that was about the 24th of March, wasn't it?

A. I wouldn't say, about that time, I won't say any definite date, I know it was toward the end.

Q. But the purpose for delivering the telegram was to assure Mr. Agostino that he would be taken care of in the deal and to let the boats land and turn everything over to you people?

A. There was no mention made of any deal. The only thing in this telegram. I told him that Mr. Morgan would be out to see him. There was no mention made of any deal in that telegram and I had no authority to make any such quotation. [516]

Q. You tell the jury then that because Mr. Morgan was going to pay Mr. Agostino a friendly visit on the 10th of April that Mr. Agostino turned over his lumber camps, his logging woods and everything to your man, Lambert, is that your contention?

A. He didn't turn it over.

Q. They came right in and landed and tied up there and started operations, didn't they?

(Testimony of Basil I. Rowell.)

A. He didn't have to land on the other property to get in there.

Q. But he did do it anyway, didn't he do it, you know that, don't you?

A. No, I wasn't there.

Q. On the 10th when you came down there the men were cutting timber, weren't they, 10th of April when you and Mr. Morgan got there?

A. I think they were, yes, sir.

Q. And did you know whether or not the log house or the big bunkhouse and mess house, we will call it, or cook shack, do you know whether that was used for a storage there for quite a while or not at first?

A. Whose—one are you referring to?

A. There is just one there now. Please remember that we never contended but that there was one—the log house that belonged to Agostino and Mr. Socha at the mouth of the Barry Arm camp, do you know whether or not that was used for storage? [517]

Mr. Boochever: Your Honor, that is outside the scope of the direct examination; it is improper cross-examination.

The Court: Overruled.

The Witness: I had never stored anything there; I didn't know anything about it if it was. I was in there at that time and there was nothing in it.

Q. (By Mr. Bell): And that was the 10th of April? A. Yes.

(Testimony of Basil I. Rowell.)

Q. Did you see Mr. Morgan any more after the date that you and he were there?

A. He made frequent trips down.

Q. I mean did you see him any more for the next week or ten days, say, after that 10th day of April after you were in there?

A. He spent some time at the mill, rather, just how long I wouldn't be prepared to say. It might have been one-day or two.

Q. On the 10th of April how did you and Mr. Morgan go? A. Went by boat.

Q. By boat—one of your boats? A. No.

Q. Whose boat was it?

A. It was the John L. Seed.

Q. And you just chartered it for the trip over there?

A. He was working for the company—going to do towing for the company. [518]

Q. It was one of the towboats that were later used by the company for towing logs out of that area? A. That is right.

Q. Now, you got back home the same night you went out, did you? A. Yes.

Q. And do you know where Mr. Morgan went immediately after getting back to Whittier?

A. No, I don't recall, but I imagine he stayed in Whittier because there was no way you could get out at that time.

Q. And all you can remember seeing there was

(Testimony of Basil I. Rowell.)

two caterpillars, one donkey, one frame building, one sawmill, are you sure that is all?

Mr. Boochever: I object to that question as too general—"all he saw there."

Q. (By Mr. Bell): All the property that you saw there that Bruno Agostino was at least attempting to sell to your boss, Mr. Morgan, or the Columbia Lumber Company?

The Court: Objection is overruled. He may answer that.

The Witness: We just made a quick survey and I would have to stop and think and possibly write it down to name it—to name the things I saw.

Q. (By Mr. Bell): When you testified on direct examination you testified that you saw a lean-to there, too? [519]

A. That was in the same building as the shop. It was just, in other words, by "lean-to" I mean there was no front or back to the building or anything, it was just built on the back end of the shop. It was all on the same building, really. And then there was a cabin, of course, Bruno's own little cabin where he lived.

Q. And that is all you saw there, was it, was that all you saw?

A. That day we went out there.

Q. I hand you a photograph that has been marked Plaintiff's Exhibit Identification 38 and ask you if you have ever seen that building?

A. That is the main building.

(Testimony of Basil I. Rowell.)

Q. That is the main building there, is it, or the front end of the main building?

A. That is right.

Q. You saw that there, didn't you?

A. That is right.

Q. I will hand you Plaintiff's Exhibit Identification No. 39 and ask you to state if you have ever seen that?

A. That looks like the shop with that lean-to at the back end.

Q. Show me where the lean-to is? That is what you referred to?

A. Just that little roof over there. [520]

Q. You didn't see the garage building at that time, it was just the lean-to that you saw, was it?

A. No, I saw the shop, too.

Q. And you saw the garage building?

A. The shop and the garage, yes.

Mr. Bell: We offer Plaintiff's Exhibit 38 in evidence.

Mr. Boochever: We object to it, Your Honor, as improper cross-examination; that it is also repetitious, and they have introduced all sorts of pictures of their——

The Court: Overruled, it may be introduced.

Mr. Davis: I think the picture identified as 39 is already in evidence.

Mr. Bell: I offer in evidence Plaintiff's Exhibit Identification No. 39.

The Court: It may admitted.

(Testimony of Basil I. Rowell.)

Q. (By Mr. Bell): Didn't you keep an exact record of the cost of repairs on separate properties like caterpillars and different properties?

A. We kept track of the cost for each camp and each different piece of machinery but it wasn't segregated. The only way to do that would be to go through all the records.

Q. Haven't you any such records so that you could show us the actual record of each cost and who you paid it to?

A. No, I wouldn't have it down here; I am not connected with that any more. [521]

Q. Have you ever had?

A. Yes, it was in the office.

Q. Have you ever seen it since you have been here in Anchorage?

A. The total cost of preparing all that?

Q. Yes, the total cost, if you have it. Do you remember seeing a telegram that came for Bruno Agostino to your office in Whittier from the Forestry Service that you later caused to be delivered to Bruno?

A. No, I don't recall any particular telegram. There were quite a lot of them came there from different places but we didn't hold them, just passed them on.

Q. You did see this one that came from the Forestry Service at Juneau to Bruno Agostino?

A. No, I didn't see any telegram.

Q. Did you see a telegram that was from the For-

(Testimony of Basil I. Rowell.)

estry Service confirming Bruno's sale of 250,000 feet of logs? A. I didn't see that.

Q. To refresh your memory, didn't you and Mr. Lambert and Bruno open it and didn't you and Mr. Lambert and Bruno read it together out there at Barry Arm?

(No response.)

Q. Do you know what happened to that telegram you showed to Bruno Agostino from Mr. Morgan?

A. No, I don't. I had it in my briefcase at that time. [522]

Q. It is a rather important message, you would consider it a rather important message, wouldn't it?

A. All telegrams are kept on file.

Mr. Boochever: I object to that first part in which counsel is testifying with regard to the message.

The Court: He can ask whether he thinks it.

Mr. Bell: If you will read the question, I think mine is just a question.

The Court: Counsel is in the habit of making a statement and then stating "didn't it."

Mr. Bell: I would like to have that one read, Your Honor, because I backed up on that and merely asked the question.

Mr. Boochever: I move to strike the part where counsel states it is a rather important message.

The Court: Motion is granted.

(Testimony of Basil I. Rowell.)

Q. (By Mr. Bell): Would you consider it a rather important telegram? A. Yes.

Q. Did you consider it a very important telegram then? A. Yes, I did.

Q. And did you put it away anywhere so that it could be preserved?

A. All telegrams are kept on file.

Q. Do you know where it was when you left the employ of the Columbia Lumber Company? [523]

A. I had no occasion to look but I presume it would have been on file unless it had got lost somewhere.

Q. And if it was on file there it would be easily found then, would it not? A. I don't know.

Q. You set up a good filing system while you were there?

A. You see they are very busy and all those papers and all those papers were put in a huge basket and it was only periodically that the lady in the office got around to do any filing. And then when she did—and it was possible only every week or two weeks she got around to do it.

Q. You say you carried that out in your brief case, where did you carry it?

A. Out to camp and back, the only——

Q. Then you never carried it anywhere else, did you? A. No.

Mr. Bell: All right, that is all.

Mr. Boochever: No further questions, Your Honor.

The Court: That is all. Another witness may be called.

Mr. Boochever: Defendant rests, Your Honor.

The Court: Any rebuttal testimony?

Mr. Bell: Yes. Do you mind a five-minute recess?

Mr. Davis: Before going on with rebuttal, Your Honor. During the early stages of this trial certain testimony was given by Bruno Agostino of oral conversations with a Mr. Lambert. [524] At that time objection was made to those statements, first, on the ground that a contract in question, if any was ever reached, was later reduced to writing; second, on the ground that Mr. Lambert had not been shown to be an agent authorized to act for Columbia Lumber. The Court at that time allowed the testimony, overruled the objection subject to the matter being connected up to show that Mr. Lambert was an agent of Columbia Lumber for this purpose.

Now, it is apparent at this time both on the plaintiffs' case and on our case that Mr. Lambert was not an agent of Columbia Lumber for this purpose, had no authority whatsoever to bind Columbia Lumber and I would like at this time to renew the motion to instruct the jury to disregard the testimony of Mr. Agostino about those oral conversations.

Mr. Bell: Your Honor, those have been connected up directly by Mr. Lambert. He said he made the deal at the time he was an employee of the Columbia Lumber Company and was working for them and that he made it after a telephone

conversation with Mr. Morgan directing him to do it. And, then, they couldn't deny it because they are estapped to deny it because they accepted the benefits of it and still have retained the benefits of it.

Mr. Davis: If the Court please, in the first place Mr. Lambert did not so testify, as I remember it, his testimony was that he had no authority from Columbia Lumber except authority [525] to carry the message that Mr. Morgan had given him and he told what the message was and it certainly wasn't any kind of a deal.

In the second place, we have denied from the beginning that we ever accepted any benefits whatsoever and the evidence bears us out in that respect.

The Court: One part of Agostino's testimony should not have been admitted in view of later developments and probably should not have been admitted then. Agostino, Ladies and Gentlemen, refers to Lambert as the logging superintendent for the defendant, Columbia Lumber Company, and afterwards he referred to him as a foreman for Columbia Lumber Company. That testimony you should disregard.

In fact, it is apparent now as a matter of law from the testimony that Lambert had only such authority as he received by telephone or telegraph from the office of the Columbia Lumber Company at Juneau in his capacity, whatever it was, working for the Columbia Lumber Company. It is clear that he had no authority to buy property—any

property—and certainly no property for a very considerable sum of money.

You may rightly consider the testimony given concerning the contents of the telegram which has been produced in evidence. The witnesses, apparently, do not entirely agree as to what was contained in the telegram or what authority was given to any body thereunder. [526]

The remainder of counsel's motion to strike all of the testimony of Lambert on the subject is denied, but that part is granted which has to do with Agostino's testimony concerning Lambert's position, first, as Superintendent within some capacity and afterwards as foreman.

Mr. Davis: Your Honor, I think the Court misunderstood the motion or maybe I didn't make it clear. My motion was to strike the testimony of Mr. Agostino concerning conversations he had with Mr. Lambert. Now, apparently, there were, according to evidence, three or four conversations between Mr. Lambert and Mr. Agostino prior to the time of this telegram. I think that those were improperly admitted at that time and should be stricken.

The Court: Motion is denied.

Court stands in recess until 2:25.

(Short recess.)

The Court: Without objection the record will show all members of the jury present. A witness may be called in rebuttal.

KENNETH D. LAMBERT

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Ross:

Q. Mr. Lambert, in your direct examination you stated to the [527] jury, I believe, that it was practically impossible or impossible for two logging operations to be carried on at Barry Arm camp on Mosquito Creek at the same time, is that right?

Mr. Boochever: Object to that, Your Honor, as leading and in the second place improper redirect.

The Court: Objection is sustained upon the first ground. You can ask him whether he did testify to that.

Q. (By Mr. Ross): Did you testify on direct examination, Mr. Lambert, that two concerns could not operate at Barry Arm campsite of Mosquito Creek logging operations at the same time?

Mr. Davis: Your Honor, if he did testify to that we are repeating what went on in the main case and should not be put on in rebuttal.

The Court: That is right, unless it is preliminary to some other question.

Mr. Ross: It is preliminary, Your Honor, to show why.

Mr. Boochever: That was all on their direct case, Your Honor.

(Testimony of Kenneth D. Lambert.)

The Court: It is no part of rebuttal. If you want to reopen up your case and put in additional testimony that should have been offered in chief, that is another matter.

Mr. Ross: It was my understanding, Your Honor, we were opening up this case after changing certain pleadings for this purpose and also to prove value of certain property. [528]

The Court: Counsel requested leave to open it up to prove value.

Mr. Ross: And this, I think, Your Honor, is preliminary to proving the value of certain equipment there.

The Court: Objection is overruled; witness may answer. Exception will be noted.

The question is: Did you so testify, Mr. Lambert?

The Witness: Yes, I did.

Q. (By Mr. Ross): Mr. Lambert, explain why two concerns couldn't operate simultaneously in Barry Arm camp up Mosquito Creek at the same time?

Mr. Boochever: Object to that, that it is a conclusion and also improper.

The Court: Overruled.

The Witness: It could be done but it wouldn't be very practical at all; it would necessitate scaling of timber or branding of logs and they would have to be rafted together if two parties were logging in there and if rafts were made up the river it

(Testimony of Kenneth D. Lambert.)

would mean extremely high tides before they would be able to raft on an 8 or 9-foot tide. They would only have water for about an hour a day. And if the rafts were made up, why, they couldn't get them past the piling that was driven in the river. So I don't think it would be a very practical idea. [529]

Q. Is that piling you speak of piling you drove into the river or was it already there?

A. Piling I drove in to raft logs.

Q. After you drove piling into the river you say it was impossible for two parties to operate simultaneously unless the logs were branded.

Mr. Boochever: Object to that as a leading question, Your Honor.

The Court: Objection sustained.

Q. (By Mr. Ross): Now, during the meeting of you, yourself and Mr. Agostino and Mr. Morgan and Mr. Ted Rowell down at Barry Arm camp on or about April 24th or 23rd, something like that, where you stated price that Mr. Agostino and Socha were claiming for their equipment, will you state—or, at that time was there anything said, Mr. Lambert, about any little log cabin in which Mr. Agostino had sometimes stayed? A. Yes, there was.

Mr. Boochever: Your Honor, object, improper redirect as he testified about that meeting before.

The Court: That has already been gone over in direct examination and the objection is sustained;

(Testimony of Kenneth D. Lambert.)

nothing in the change of pleadings would warrant repeating it.

Q. (By Mr. Ross): Did you see Mr. Agostino and Mr. Morgan and Mrs. Morgan [530] and others together on or about the 10th day of April, 1948?

A. Yes, sometime around that date.

Q. State to the jury, Mr. Lambert, where you saw them and under what circumstances?

Mr. Boochever: Object to this again, Your Honor, as improper redirect examination.

Mr. Bell: This is redirect.

The Witness: Read the question.

(Previous two questions read.)

The Court: What relation—can I ask counsel for plaintiffs—has the filing of the Second Amended Complaint, whatever changes made therein as compared with other pleadings, to do with questions of this nature?

Mr. Ross: Your Honor, it has been testified to in this case by one of the witnesses—by Mr. Morgan—I believe, if I may state that, from the time—from the 24th of March until way in the fall until he saw Mr. Agostino here in town he had never seen him between that time.

The Court: Whether such testimony was given or not, if counsel says it was given, the question is proper rebuttal and the witness may answer.

The Witness: What was the date on that again, on July——

Mr. Ross: Yes.

(Testimony of Kenneth D. Lambert.)

Mr. Boochever: Your Honor, my remembrance of the testimony is different. My remembrance is he didn't remember how many [531] times he had seen him.

The Court: Overruled.

Mr. Ross: The date, Your Honor, was the 10th of July instead of the 10th of April.

The Court: Do you know what the question is now?

The Witness: Yes. We were all on the boat from Whittier to Barry Arm camp. It was Mr. Morgan and his wife and several other parties at Whittier—Mr. Agostino and myself and Mr. Gilbert, the Forest Service scaler was on there that time.

Q. (By Mr. Ross): You say they were going from Whittier over to Barry Arm camp?

A. From Whittier to Barry Arm camp, yes.

Q. Do you know how long that boat stayed over there? A. I think only over night.

Q. Where did they go the next day?

A. Back to Whittier.

Q. Did Mr. Agostino go back on the boat with Mr. Morgan and Mrs. Morgan?

A. I believe he did. He was not at camp the next day.

Q. Were you on that boat?

Mr. Boochever: I object to that last answer as being pure hearsay and conjectural on the witness' part.

The Court: The objection is sustained. [532]

(Testimony of Kenneth D. Lambert.)

Q. (By Mr. Ross): Did Mr. Morgan and Mrs. Morgan and Agostino and yourself together with the others that you stated were on the boat when it made the trip from Whittier over to Barry Arm camp, did they shortly return to Whittier?

A. Yes, the boat returned the next day.

Q. Were you on that boat?

A. On the way up to Barry Arm I was on the boat not on the way back.

Q. Do you recall whether or not Mr. Agostino was trying to collect his money for the Barry Arm campsite on that trip or not?

Mr. Boochever: I object to that as a leading question, Your Honor.

The Court: Objection is sustained.

Q. (By Mr. Ross): Did you hear any conversation between Mr. Morgan and Mr. Agostino during that trip? A. No.

Q. Did not hear any conversation between them?

A. No.

Q. While you were employed with the Columbia Lumber Company, Mr. Lambert, down at Barry Arm camp, did the Forestry Service run any kind of lines or was there any kind of lines running in connection with the United States Forestry Service down in that area showing the people where to cut timber? [533] A. No.

Mr. Boochever: I object to the part of the question "while you were employed by the Columbia Lumber camp" as being a conclusion.

(Testimony of Kenneth D. Lambert.)

The Court: That part may be stricken.

Q. (By Mr. Ross): While you were working down at Barry Arm camp, Mr. Lambert, of your own knowledge did the United States Forestry Service follow the practice or did it not follow the practice of marking out timber sites or timber sales and putting divisions between timbers stating which timber might be merchandisable and what not be merchandisable?

A. No, they never did, that was left entirely to my dispensation which was commercial and which was not.

Q. When you started cutting timber, Mr. Blacky Lambert, down at Barry Arm camp where did you first start cutting timber?

Mr. Boochever: Object to as improper rebuttal testimony.

The Court: Objection is sustained.

Q. (By Mr. Ross): Do you recall seeing any timber at all in between a site where Agostino and Socha had cut out trees on the east side of Mosquito Creek at Barry Arm camp and the place where you started cutting timber for Columbia Lumber Company?

Mr. Boochever: Object to that question for the same reason and also for the further reason it is a leading question. [534]

The Court: Objection is sustained.

Q. (By Mr. Ross): I will ask you then, Mr. Lambert, was there any merchandisable timber

(Testimony of Kenneth D. Lambert.)
standing between Agostino's old cutting and where Columbia Lumber Company started cutting?

Mr. Boochever: Same objection.

The Court: Same ruling. The matter was covered fully in examination in chief.

Q. (By Mr. Ross): Mr. Lambert, do you recall seeing a telegram in the office of the Columbia Lumber Company at Whittier in the spring about March or April, sometime in the spring of 1948, addressed to Bruno Agostino?

Mr. Boochever: Object to that question for the same reason, Your Honor.

The Court: I do not recall whether that question was asked or not and therefore the objection is overruled.

Q. (By Mr. Ross): Answer?

A. I saw that telegram that Mr. Agostino gave me, that I took to the Columbia Lumber Company office and I left it there.

Q. Mr. Agostino gave you? A. Yes.

Q. Where did Mr. Agostino give it to you?

A. At Barry Arm. [535]

Q. Do you know about what time that was?

A. It was sometime in March.

Q. Was it 1948? A. 1948, yes.

Q. Who was the telegram from, Mr. Lambert?

A. From the Forest Service in Juneau.

Q. Did you read that telegram? A. Yes.

Q. Will you state to the jury what was in that telegram?

(Testimony of Kenneth D. Lambert.)

Mr. Boochever: Object to that as hearsay, Your Honor.

The Court: Telegram must be accounted for before any secondary evidence can be offered upon it.

Mr. Boochever: But the secondary evidence is something which someone in the Forest Service sent to Mr. Agostino. It is irrelevant and hearsay anyway whether it is in writing or oral.

The Court: Official communication upon the subject—upon anything concerning the subject of the action I think would be admissible. The objection is overruled.

Q. (By Mr. Ross): Go ahead and answer?

A. Well, the——

The Court: Don't answer. There is no proof as to where the telegram is. Mr. Agostino is here.

Q. (By Mr. Ross): Do you know what became of that telegram that was delivered to Bruno Agostino?

A. The last I saw of it was in the Columbia Lumber Company office at Whittier.

Mr. Ross: I ask you, counsel, for this telegram.

Mr. Boochever: I wish to state we have asked for all telegrams and all communications about this matter from Whittier and we have never received or been able to obtain any copy of such a telegram or any other telegram which is bearing on this case.

Q. (By Mr. Ross): Do you know where that telegram is now, Mr. Lambert? A. No.

(Testimony of Kenneth D. Lambert.)

Q. Did you read that telegram? A. Yes.

Q. State to the jury what was in that telegram?

A. Well, it was informing Mr. Agostino that he had a continuation of his timber sale and the exact wording of it I can't remember but that was the text of it.

Q. It was a continuation of the timber sale?

A. Yes.

Q. You mean at Barry Arm?

A. At Barry Arm.

Q. And that was in March of 1948, I believe you say? A. Yes. [537]

Mr. Davis: That question, of course, is leading, Your Honor.

The Court: Yes, it is leading and the objection is sustained.

Q. (By Mr. Ross): Mr. Lambert, do you know whether or not Mr. Agostino in his timber cutting down at Barry Arm camp cut all the merchandisable timber—the tracts on which he cut timber?

Mr. Davis: Your Honor, if I remember correctly that same question was asked him in the case in chief. He answered the question fully. I don't believe it is proper at this time.

The Court: Objection is sustained upon that ground.

Mr. Ross: I don't recall, Your Honor, that specific question being asked if he cut all the timber.

The Court: I think it was asked and answered and asked several times by counsel and answered

(Testimony of Kenneth D. Lambert.)
several times also by counsel, perhaps, on both sides.

Q. (By Mr. Ross): Mr. Lambert, have you ever had any experience in appraising, inspecting and appraising, the value of machinery such as was found at Barry Arm camp when the Columbia Lumber Company started its operation there?

Mr. Boochever: Objection on the same ground—it was all gone into with him on the original case.

The Court: Not fully so. The objection is overruled and [538] the witness may answer. I think the witness qualified at that time but this is a preliminary question and may be asked again. You may answer, sir.

The Witness: Yes, I worked for the Government as an inspector and appraiser on surplus property in Seattle.

Q. (By Mr. Ross): Well, while you were working for the Government as an appraiser did you ever inspect any such equipment as caterpillar tractors and donkeys and sawmill equipment?

A. Everything but sawmill equipment. I am not qualified on sawmill equipment at all.

Q. You did inspect or did you inspect and appraise caterpillar tractors?

A. Yes, all logging equipment—caterpillars, donkeys.

Q. Mr. Lambert, I will ask you a purely hypothetical question, now we will assume that Mr. Agostino had and Socha had 250,000 feet of standing timber down at Barry Arm camp, what would

(Testimony of Kenneth D. Lambert.)

that timber be worth to Mr. Agostino and Socha?

Mr. Boochever: I object to that, Your Honor. In the first place he doesn't know what anything is worth to Mr. Socha and Mr. Agostino and I object. The second place, it was covered in redirect in regard to that timber.

The Court: The question is not rightly put, I think. The question is—what its value is and what its value is as to Agostino and Socha. [539]

Mr. Boochever: The point I am making, no one can know what the value was to Agostino and Socha other than Agostino and Socha.

The Court: That is quite right; objection is well taken on that ground.

Q. (By Mr. Ross): Did you know the value of timber standing at Barry Arm camp in March, 1948, Mr. Lambert?

A. Know the value of it standing?

Q. Yes.

A. Well, I don't know what stumpage they paid for it.

Q. Well, we will assume that they paid one dollar a thousand stumpage.

A. One dollar a thousand stumpage, you mean what the timber would be worth to Mr. Agostino and Mr. Socha?

Q. What the value of the timber would be worth there, we will say, logged and in the pond?

Mr. Boochever: Object to that as being totally irrelevant.

(Testimony of Kenneth D. Lambert.)

The Court: That is a preliminary question. Overruled.

Mr. Boochever: And the further reason that he testified to that very same question on direct examination.

The Court: He may have, I do not distinctly recall just what the testimony was on that point. You may answer the question.

The Witness: Well, that would be very hard to determine [540] just what the timber was worth to him. It would depend on his method of logging and how much labor he hired to take the timber out. If they did the work themselves and took it out on a small scale then their margin of profit would be much greater.

Q. (By Mr. Ross): As Agostino and Socha were equipped to handle timber what would have been the value of that timber placed in the pond if it had to be gotten out with the equipment that they had there at the time?

A. Well, at their price that they were receiving they should have made around six or eight dollars a thousand profit on it.

Q. On the 250,000 feet that we assume?

A. Yes.

Q. Did you ever make a close examination or inspection of the bunkhouse at Barry Arm camp that was owned by Agostino and Socha?

Mr. Boochever: Objection, Your Honor, same grounds—improper rebuttal testimony.

(Testimony of Kenneth D. Lambert.)

The Court: The plaintiff has been permitted to reopen his case for the purpose of giving further testimony as to values in view of the filing of the Second Amended Complaint and that is the only reason why this testimony is being permitted. Objection is overruled and exception will be noted.

Q. (By Mr. Ross): Did you inspect that house, we will say, the bunkhouse [541] and the cookhouse? A. Yes, I did.

Q. Will you tell the jury how that building is put up, how it is constructed, whether it is a frame building or whether it a brick building or what it is, and tell the jury thoroughly in your own words how that building is put up and something about its size?

Mr. Boocvhever: Your Honor, I make the same objection. He testified on that exact point on his direct testimony; regardless of whether there is a new basis for testimony he gave this exact testimony before.

Mr. Ross: Your Honor, his testimony, I think, will contradict their testimony it was merely a frame building and there is no testimony of his going inside and inspecting the house, the walls and anything and the type of structure it is.

The Court: I do not recall testimony as to the type of structure. The objection is overruled.

Mr. Ross: And I don't believe value was ever placed on it, either.

The Witness: It is a log building and it is all

(Testimony of Kenneth D. Lambert.)
hewed inside and I think there are six rooms in it, stove, bathroom, and mattresses n there, and cots and it is a very good building.

Q. (By Mr. Ross): You say the logs are hewed inside? Explain what you mean by that? [542]

A. When they built the building they pe*a*led the logs and then on the inside they hewed it just as smooth as a wall—very good log house, well constructed, in fact it is one of the best ones I have ever seen built.

Q. And you have had occasion many times, have you not, to inspect log houses and buildings of camp equipment at various places in the country, or have you?

Mr. Boochever: Object to that as leading.

The Court: Overruled.

The Witness: I have.

Q. (By Mr. Ross): What would you estimate the value of the bunkhouse and the cookhouse of Agostino and Socha at Barry Arm Camp?

Mr. Boochever: Object to that as no proper foundation.

The Court: Overruled.

Q. (By Mr. Ross): Value down there?

A. Well, I will say it couldn't be built for $10,000.00.

Q. Then what would you say the value would be of that building at Barry Arm camp?

A. Well, it would still be worth $10,000.00 if you had to build it there.

(Testimony of Kenneth D. Lambert.)

Mr. Boochever: Object to that answer and move that it be stricken as not being responsive to the question.

The Court: Overruled. [543]

Q. (By Mr. Ross): After you went to work for Columbia Lumber Company, Mr. Lambert, did you ever use the pond that was used by Agostino and Socha for booming logs together?

Mr. Boochever: Object to the portion of the question which states "after you went to work for the Columbia Lumber Company" as improper.

The Court: Well, "to go to work for" doesn't necessarily mean employment. The question may be "after you began to take on logs to be sold or delivered or given to the Columbia Lumber Company, then did you use——?"

The Witness: Yes, we used the pond.

Q. (By Mr. Ross): State to the jury how you used the pond, Mr. Lambert, and how much timber that you placed in the pond and so forth in your own words just state to the jury?

A. We used the pond for about two rafts which was approximately 200 and 250-thousand board feet and after that the pond was not practical to us any more so we discontinued its use. The pile driver came up from Whittier and we drove piling in the main channel of the river and rafted our logs there.

Q. Why wasn't the pond used after that, state just why it wasn't used?

A. Well, the timber was further on up the river

(Testimony of Kenneth D. Lambert.)

and we had a new dumping ground for our logs where we dumped right into the [544] river and we floated them down to where we rafted them.

Q. While you and Mr. Morgan and Mr. Agostino, Mr. Rowell, were sitting down there at Barry Arm camp on the log discussing—carrying on a discussion about April 10, 1948, was anything said about any small cabin? A. Yes, it was.

Q. State to the jury what was said about that small cabin?

Mr. Boochever: Your Honor, that same question was asked a few minutes ago. It was objected to and the objection was sustained.

Mr. Bell: Your Honor, it wasn't brought out on the defense testimony that there was a controversy when Mr. Butcher testified about a controversy over a little log cabin that Bruno called his own.

The Court: My recollection is there was testimony about a little cabin in the case in chief and for that reason the objection is sustained.

Mr. Bell: Exception. We want to make an offer of proof. We offer to prove by this witness if he were permitted to testify that he was sitting on the log with Bruno Agostino and Ted Rowell and Mr. Morgan at Barry Arm camp on the 10th day of April, 1948 and he heard a conversation between Mr. Morgan and Mr. Agostino in which a little cabin that is referred to as Bruno's little cabin, not the cookhouse or the garage or any of the larger

(Testimony of Kenneth D. Lambert.)

buildings but just a little cabin that Bruno's [545] clothes are in, and in that conversation Bruno asked Mr. Morgan if he wanted that cabin too and Mr. Morgan said "No, you can have that, I don't care anything about that."

Mr. Boochever: We must repeat the objection that this witness testified in regard to that very conversation and told what he knew about the conversation at the time and it is nothing new to be added on that score now.

Mr. Bell: Before Your Honor rules, we want to call your attention to the fact that this little cabin proposition first came out in the testimony of Mr. Butcher in which he said that Bruno objected to giving them this little cabin, and this is——

The Court: My impression is I can't remember all of the testimony—my impression is that there was some testimony about it. I don't remember whether this Mr. Lambert was asked about it.

Mr. Boochever: Your Honor, I believe I further wish to point out this testimony, if it did happen, happened on April 10th and would be totally irrelevant to vary a written contract entered into on June 29th or thereabouts.

The Court: That objection, in my judgment, is not well taken. I think I will admit the evidence upon the theory I am not certain what the testimony was.

The question may be answered.

Q. (By Mr. Ross): Please state what——[546]

(Testimony of Kenneth D. Lambert.)

A. Yes, there was an understanding that Mr. Agostino could keep that little cabin that it was no use to the Columbia Lumber Company or us whatsoever.

Mr. Davis: Now, Your Honor, I would move that the answer be stricken on two grounds—in the first place it is apparent from the testimony that there wasn't any agreement reached at any time there. In the second place there was a written agreement made at a later time including all the property and equipment.

The Court: Motion is denied.

Q. (By Mr. Ross): While you were working down at Barry Arm Camp for Columbia Lumber Company, as you have testified before, were you ever instructed by the Columbia Lumber Company —by Mr. Morgan to return any equipment that you might have used that belonged to Agostino and Socha at the time the Columbia Lumber Company started its operations at Barry Arm camp?

Mr. Boochever: Your Honor, I hesitate to object again, but counsel insists on putting in "while you were working for Columbia Lumber Company" in each one of his questions, and, of course that is not the truth in the matter and not the case and I object to that portion of the question.

The Court: Will counsel rephrase his question and leave out the objected to phrase? [547]

Q. (By Mr. Ross): While you were working at Barry Arm camp, Mr. Lambert, were you ever

(Testimony of Kenneth D. Lambert.)

instructed by Mr. Morgan—Thomas Morgan here or the Columbia Lumber Company to return any equipment that you had used that belonged to Mr. Agostino and Mr. Socha that they used there in connection with their operations?

Mr. Boochever: Your Honor, I object to that as leading. There is no testimony that he ever used any equipment of Mr. Agostino or Mr. Socha much less that he returned.

Mr. Ross: There is plenty of testimony in this case, Your Honor, that he used six barrels of oil and a barrel and one-half of gasoline.

The Court: Objection is overruled; you may answer.

The Witness: No, there never was anything said about returning it at all. I mailed a credit memo to the Columbia Lumber office crediting Mr. Agostino with six barrels of diesel oil and a barrel and one-half of gasoline and that is all I used of his.

Q. (By Mr. Ross): Did you ever return any of that equipment? A. No.

Mr. Davis: Now, Your Honor, I wonder if it wouldn't be wise at this time to instruct the jury that Mr. Lambert at the time he used this diesel oil and gasoline was acting as an independent contractor and that his actions do not bind Columbia Lumber in any way.

The Court: Motion is denied at this time. The subject [548] will be covered generally in the written instructions.

(Testimony of Kenneth D. Lambert.)

Q. (By Mr. Ross): All right. At the time you made your settlement with Columbia Lumber Company for your term of employment down at Barry Arm camp were you charged with the equipment that you used—this six barrels of oil and barrel and one-half of gasoline that you have just testified to—were you charged up with that?

A. Well, it was charged indirectly to the camp but the Columbia Lumber Company assumed all obligations of the Camp One operations.

Mr. Boochever: I must object to that answer there as a conclusion of law.

The Court: Overruled.

Q. (By Mr. Ross): Mr. Lambert, do you know the value of the oil that was taken from Socha and Agostino's camp per barrel?

A. No, I don't remember the prices of it right now.

Q. Do you know the value of the gasoline?

A. No, I don't remember what the price was.

Q. Did you ever inspect the garage there at Barry Arm camp that belonged to Socha and Agostino? A. Yes, I did.

Q. Will you tell the jury how that building is constructed?

A. Well, it was a frame building with benches and bins in [549] there for racks for tools, there was a nice little shop more or less fixed up like a garage. There was a forge in there, drill press.

Q. How big was that building, Mr. Lambert?

(Testimony of Kenneth D. Lambert.)

A. I don't know just how big it was. It was fairly good size though.

Q. You say it was a frame building?

A. Yes.

Q. What would you estimate the value of that building to be at Barry Arm camp?

Mr. Boochever: Object to that as no proper foundation.

The Court: Overruled. You may answer.

The Witness: Oh, I would say $2,000.00 anyway.

Q. (By Mr. Ross): Did Columbia Lumber Company store equipment there at the cookhouse and the bunkhouse or the garage after they commenced their operations at Barry Arm camp?

Mr. Davis: If the Court please, the identical question was asked him on his case in chief and he answered he did not.

The Court: The objection is sustained.

Mr. Ross: I think the question was asked Mr. Morgan, all right, Your Honor, but never asked——

The Court: It was asked this very witness as I recall it.

Mr. Ross: That is all. [550]

The Court: Counsel for defendant may examine.

Further Recross Examination

By Mr. Boochever:

Q. In regard to the value of the house and also the garage that you just mentioned, that would not have much value to an outfit that was already

(Testimony of Kenneth D. Lambert.)
equipped with everything they needed there, would it?

A. No, it wouldn't have much value to them unless they needed it.

Q. Now, did Tom Morgan or anyone in power at Columbia Lumber Company ever tell you that you could use Bruno's equipment there?

A. No,——

Q. Did they ever tell you—pardon me.

A. I will have to retract. Mr. Morgan told me I could use that equipment. That was at the time I terminated with the Columbia Lumber Company.

Q. But prior to that time had he ever told you that? A. No.

Q. In fact he told you just the opposite?

A. That is right.

Q. And the borrowing of those barrels of oil was done on your own, isn't that right?

A. Yes.

Q. Entirely so? A. Yes. [551]

Mr. Boochever: No further questions, Your Honor.

The Court: That is all.

Further Redirect Examination

By Mr. Ross:

Q. Did you report taking the six barrels of oil and the one and one-half of gasoline to the Columbia Lumber Company, Mr. Lambert?

A. Yes.

(Testimony of Kenneth D. Lambert.)

Mr. Boochever: Your Honor, there is one question I meant to ask the witness before this.

The Court: Counsel may ask it now.

Further Recross-Examination

By Mr. Boochever:

Q. Now, you spoke about a conversation of April 10th in which some mention was made of a small cabin, Mr. Lambert? A. Yes.

Q. Was any agreement reached in regard to the sale of that property at that time? A. No.

Mr. Boochever: That is all, Your Honor.

Further Redirect Examination

By Mr. Ross:

Q. Now, that property, Mr. Lambert, when you state that do you mean just that cabin or do you mean the agreement about the whole Barry Arm campsite? [552]

A. The whole Barry Arm campsite including all material that was there, all equipment.

Further Recross-Examination

By Mr. Boochever:

Q. Was any sale made at that time of the Barry Arm camp? A. No.

Q. Was any made prior to the date when you were there? A. Not to my knowledge.

Mr. Boochever: That is all, Your Honor.

The Court: That is all, Mr. Lambert, you may step down.

(Testimony of Kenneth D. Lambert.)

Mr. Ross: I would like to ask one more question, Your Honor.

The Court: Very well.

Further Redirect Examination

By Mr. Ross:

Q. Mr. Lambert, would you have ever moved into Barry Arm camp with Columbia Lumber Company camping equipment if you had not received the permission of Agostino to move in?

Mr. Boochever: I object to that question as being improper recross examination now.

The Court: Overruled, you may answer.

The Witness: No, I never would. I wouldn't have moved in there without Bruno's permission at all.

Q. And at the time you moved in there, Mr. Lambert, was it your understanding or was it not that the Columbia Lumber [553] Company was buying Socha and Agostino out?

Mr. Boochever: Object to that as being leading and improper.

The Court: Objection is sustained.

Mr. Ross: That is all.

Mr. Boochever: That is all.

The Court: That is all, Mr. Lambert.

BRUNO AGOSTINO

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

(Testimony of Bruno Agostino.)

Further Redirect Examination

By Mr. Bell:

Q. You are the Bruno Agostino who testified before in this case, are you not? A. Yes, sir.

Q. Bruno, you heard Mr. Morgan testify, did you not? A. Yes.

Q. You heard him testify he couldn't find you from the time he left you down there in April 10th?

A. Yes.

Mr. Boochever: I object on that, Your Honor, as incorrect, the statement of counsel is incorrect.

Q. (By Mr. Bell): All right, did you hear him testify to this or in this substance "That he never could find you after the time he left [554] you down there? A. I did.

Mr. Boochever: Your Honor, I object to that as improper redirect examination and what he heard a witness say on this stand is totally immaterial and has nothing to do with the issues right now he is trying to prove.

The Court: Overruled.

Q. (By Mr. Bell): Now, Mr. Agostino, did you see him on the 10th day of July, 1948?

A. Yes, I was in his office.

Q. Where did you see him, where was his office?

A. Whittier.

Q. What was the purpose of your visit there?

Mr. Boochever: Object to what the purpose of the visit was, Your Honor.

(Testimony of Bruno Agostino.)

The Court: Unless it is connected with this present action or the subject matter of it.

Mr. Bell: It, of course, would be connected with this.

The Court: Overruled, you may answer.

The Witness: When I was going to Barry Arm to get some of my stuff back and I went to Mr. Morgan in the office and Mr. Jacobson.

Mr. Bell: Your Honor, I wonder if we could ask the witness to slow down a little. [555]

The Court: Speak more slowly, Mr. Agostino.

Q. (By Mr. Bell): Did you talk to him at Whittier? A. Yes.

Q. Did you leave there and ride with him on a boat? A. Yes.

Mr. Boochever: Object to this as a leading question.

The Court: Sustained.

Mr. Bell: All right, I will take up all the time that is needed.

Mr. Boochever: Objection.

The Court: Objection is sustained.

Q. (By Mr. Bell): Mr. Agostino, after you left Whittier where did you go?

A. To Barry Arm.

Q. Who went with you?

A. Mr. Morgan and his wife and Mr. Lambert and two or three other people, I don't remember who they are—their names.

Q. How did you go? A. By the boat.

(Testimony of Bruno Agostino.)

Q. How long did it take you to go?

A. It take about 3 hours.

Q. And how long did you stay at Barry Arm?

A. Well, I stay only half day and I was going to stay there but I talked to Mr. Morgan and I asked him if that deal is [556] going to go through and he said "Yes, yes, that is a deal, you come to town and we settle".

Q. And then did you come back on the boat or not?

A. I come back on the boat with Mr. Morgan but I never saw Mr. Morgan after I left Whittier.

Q. Please tell the last time you talked to him on the trip, where were you? A. Whittier.

Q. In Whittier? A. Yes.

Q. And where did you go then after you left Whittier? A. I came here to Anchorage.

Q. And then did he come to Anchorage?

A. Well, he might have come but I never saw it. I waited down at Mr.—to the Columbia office—Lumber office down here, I forget his name, he told me to wait one-hour and I did wait one-hour and he never come back.

Q. Did you ever see Mr. Morgan any more until the trial of this case started?

A. No more, that was the first time I seen him.

Q. Mr. Agostino, did you ever see the letter that Mr. Butcher identified here or was introduced by the defense in this case?

Mr. Davis: Your Honor, the same question was

(Testimony of Bruno Agostino.)

asked; witness answered he did not on the case in chief; it is improper at this time to go into that again. [557]

Mr. Bell: He was asked by cross-examination if he didn't see a certain letter and he said he didn't but now Mr. Butcher has made it competent.

Mr. Boochever: I don't know what difference it makes. He has testified to that same question before.

The Court: It is—the letter was not in evidence at that time?

Mr. Boochever: It was introduced in identification and it was shown to this same witness and he was——

The Court: Were you shown that letter when you were on the stand before?

The Witness: I never see this letter before only here in Court.

The Court: When you were on the witness stand before did you see the letter?

The Witness: I think I did, the same letter.

The Court: The objection is sustained then. He has already replied on it.

Q. (By Mr. Bell): Did Mr. Butcher ever tell you anything about receiving that letter?

A. No.

Mr. Boochever: Object to that, Your Honor. same reason—this has been gone over before.

The Court: Objection sustained. [558]

(Testimony of Bruno Agostino.)

Mr. Boochever: And move that the answer be stricken.

The Court: Answer stricken.

Q. (By Mr. Bell): Did Mr. Butcher at any time discuss the receipt of that letter or the contents of it with you? A. Never.

Mr. Boochever: Same objection, Your Honor.

The Court: Same ruling.

Mr. Bell: Exception.

The Court: Counsel has proceeded far enough with that.

Q. (By Mr. Bell): Did you ever know or were you ever requested to furnish an itemized statement of that equipment down there?

Mr. Boochever: That also has been gone into, Your Honor.

The Court: I do not recall that. What is the answer?

The Witness: They never asked me. Mr. Morgan, they say the contract is good enough. They don't need any itemized statement because he knows what was in the camp.

Q. (By Mr. Bell): Where were you at the time Mr. Morgan told you that?

A. Right in Mr. Butcher's office.

Mr. Davis: Now, Your Honor, not only was the same question asked but the same answer was made.

The Court: It may have been given but I do not recall that question or that answer. Overruled.

Q. (By Mr. Bell): Mr. Agostino, what did you

(Testimony of Bruno Agostino.)

pay for the sawmill that was there on the bank at Mosquito Creek?

Mr. Boochever: Your Honor, object to that as being immaterial unless it is shown when and what went on in the meantime and in addition it was gone over on direct examination as to what he evaluated——

Mr. Bell: That was one of the things I asked permission to reopen to prove.

The Court: Overruled.

The Witness: $1950.00.

Q. (By Mr. Bell): And where was it when you bought it?

A. Down what they call Irish Cove. It is below Ellamar about ten or twelve miles.

Q. How did you get it from Irish Cove to your place?

A. Well, we got the scow and we got the Jim Dolan to go there and load it and bring it up to Barry Arm.

Q. Now, after you got it there what did you do with it?

A. Well, we set it up, put up a foundation and it was ready to saw with a belt. I needed a belt, that is all.

Q. Now, then, was it worth as much or more or less when you turned it over to the defendant in this case?

Mr. Boochever: Object to that as a leading question.

(Testimony of Bruno Agostino.)

The Court: Sustained. [560]

Q. (By Mr. Bell): Do you know what its value was at the time you turned the property over to the Columbia Lumber Company?

Mr. Boochever: Same objection, Your Honor.

The Court: The first part is a legitimate question. The question whether he did turn it over to the Columbia Lumber Company, that is up to the jury to decide.

Mr. Bell: That is right, but he has contended and has so testified that he turned it over to them.

The Court: You may answer.

The Witness: It should be worth $1950.00 if not worth any more.

Q. (By Mr. Bell): How much work did you do on it?

A. We worked three men pretty near a month putting in foundations 150 feet long and 30 feet wide.

Q. And how long did you work the three men?

A. About, over 30 days.

Q. Now, Mr. Agostino, what would you ordinarily make in profit on the cutting of 250,000 feet, board measure, of timber like you had standing there in March at the time you quit cutting or left it to them, what would you have made in net profit basing it upon your previous experience?

Mr. Davis: Your Honor, net profit hasn't any bearing on this case at all. I think the question is improper. [161]

(Testimony of Bruno Agostino.)

The Court: Overruled. You may answer.

The Witness: I just tell you the figure what we make before. We had three men, we made $9,000.00 in three months and one-half. Now, I don't figure what we would make a day.

Mr. Davis: Your Honor, that answer isn't responsive to the question at all.

Q. (By Mr. Bell): I will change the question then. How much did it cost you per thousand feet to cut logs and put them in the water?

A. Well, I don't figure what it would cost just 1,000 feet to put it over. I go with the cat and haul on the logs and pull them right up in water at one time and it don't take an hour to knock down a tree two or three thousand feet. We make $10.00 a day clear on a thousand feet.

Q. Now, what were you getting for logs in the water at Mosquito Creek per thousand feet?

A. Well, I would say we make $10.00 a thousand.

Q. $10.00 a thousand profit? A. Yes.

Q. And you had 250,000 feet of lumber purchased there?

Mr. Boochever: I object to that as leading, Your Honor.

The Court: Overruled.

Q. (By Mr. Bell): Mr. Agostino, where was your timber—this 250,000-feet of board measure timber that you had bought with reference to [562] your camp house?

(Testimony of Bruno Agostino.)

Mr. Boochever: Your Honor, I object to this as being improper rebuttal testimony.

The Court: Objection sustained.

Mr. Bell: Your Honor, it was testified by Mr. Morgan that it was south of his house and he has never fixed the direction in it.

The Court: This witness told about it upon his case in chief as to where the timber was.

Mr. Bell: Your Honor, maybe you could tell me where it was. I couldn't attach it.

The Court: Counsel knows that question isn't proper.

Q. (By Mr. Bell): All right, then. Mr. Agostino, tell us whether it was south or north of your house?

Mr. Boochever: I object to that, Your Honor, same objection. It is the same question again.

The Court: I think it is, too. You may answer.

The Witness: It is northwest of my house.

Q. (By Mr. Bell): Now, Mr. Agostino, were you there after they started—after Lambert started cutting timber, were you there around the place when Lambert started cutting timber?

A. Yes.

Q. Where did he start cutting timber with reference to your [563] house?

Mr. Boochever: I object to that as being——

The Court: That has all been gone into. The objection is sustained. Counsel will desist from further examination on matters that have been gone

(Testimony of Bruno Agostino.)

over in chief. This case is reopened to give additional proof as to values.

Q. (By Mr. Bell): Bruno, what would you say or do you know the value of the cookhouse and bunkhouse that you and your partner had built there at Barry Arm?

Mr. Davis: Your Honor, I object. I believe that the same question was asked and the question was answered somewhere in the neighborhood of somewhere near three or four-thousand dollars on direct examination.

Mr. Bell: He said they spent that much on lumber.

The Court: Objection is overruled.

Mr. Davis: Not lumber—logs.

The Witness: Well, I said the last time that if it was in Anchorage it would be worth $30,000 or $35,000.

Mr. Boochever: The witness himself is repeating just what he said last time on this question.

The Court: The answer may be stricken because what it is worth in Anchorage is no indication as to what it was worth on Barry Arm. It may be worth a million dollars here.

The Witness: In Barry Arm I think it was worth anyway [564] then $5,000.

Q. (By Mr. Bell): What would the garage be worth there at Barry Arm?

A. Garage worth about a thousand dollars because we pay $800 for just lumber without the labor

(Testimony of Bruno Agostino.)
to build it.

Q. And you paid that money to the Columbia Lumber?

A. Yes, I consider a thousand dollars anyway.

Q. Bruno, there has been some testimony here that one of your cats was in salt water once, will you please tell the jury when that was?

A. Well, it was in salt water for about 40-hour and we take it out and wash them with cold—with some solvent solution, and we never notice that the cat be in salt water. It work right along and use it as before.

Q. About what date was that, Bruno?

A. That was—if I remember—it was around in first of May, second of May.

Q. In what year? A. 1945.

Q. 1945? A. Yes.

Q. And you have used it constantly from that time up to the time you left?

Mr. Boochever: Object to that as leading, Your Honor.

The Court: Objection is sustained. [565]

Mr. Boochever: And move that the answer be stricken.

The Court: Answer may be stricken.

Q. (By Mr. Bell): Had you used it up right along up to the time you sold it? A. Yes.

Q. Was it in working order in March of 1948?

A. Yes, in good order.

(Testimony of Bruno Agostino.)

Q. And what about the RD-7, was it in good order or poor order?

A. RD-7 on May, 1947 Mr. Morgan saw that cat working in the pond. He saw it in his own eye it is in very good shape.

Q. I will ask you whether or not there was any blades on these cats?

A. Yes, there was a blade on the D-8.

Q. Blade on the D-8? A. Yes.

Q. Was that a home-made blade or was that the one that came with the cat?

A. That came from the factory with the cat.

Q. Did that blade have any kind of hoist for it?

A. It had two hoists that is for logging and they have a hoist for the—not a hoist—for the plow—for the blade.

Q. Now, Mr. Agostino, did you see in late August or early September those particular cats when you were down there?

A. Yes, I seen them working. [566]

Q. And where were they working?

Mr. Boochever: Your Honor, I object to this. He has gone over this exact same thing before on his direct case—identical question, identical answer.

The Court: Objection is sustained.

Mr. Bell: Exception. Your Honor, it has been testified that they didn't work. I don't remember if he testified he saw them working—All right, I will—just give me an exception, please.

(Testimony of Bruno Agostino.)

Q. When you did take those pictures down there were the cats operating that day?

Mr. Boochever: I object to that as being too indefinite. He took pictures on two different occasions and moreover he went into that on his direct case.

The Court: That was not answered, if I recall.

Q. (By Mr. Bell): On August 30th or September 1st or along about that date when you took the small pictures which were introduced here, were the caterpillars in operation at that time?

A. I went up to Barry Arm because they told me——

The Court: Answer the question.

Q. (By Mr. Bell): Were they operating?

A. Up Columbia camp, up the Columbia camp up above Barry Arm. [567]

Q. They were up at Columbia camp?

A. Yes.

Q. Were they operating up there?

A. Up at the camp up there.

Q. They were? Now, did you see the caterpillars in action that day?

A. I see one cat coming home. I never went where he was working.

Q. How far away was it when you first saw it?

A. It was right there in the camp just about 20 or 30 feet.

Q. Where did it stop?

A. Stopped right on that camp—on the Columbia camp.

(Testimony of Bruno Agostino.)

Q. You say it was coming in from where it was working; please tell where it was working?

A. Come in from up above from the camp which was farther north, coming down to the camp.

Q. Do I understand that the cat was coming from the woods to the camp?

A. To the camp, yes.

Q. And you saw it at that time?

A. Yes. You don't understand that?

Q. Yes. I am sorry, Bruno. Was it operating normally at that time?

A. Well, I didn't see it working, I see him coming home. I suppose it was in good order. [568]

Q. When it was coming home was it running on its own power?

A. Yes, sir, you no can drag it.

Q. What cat was that? A. It was the D-7.

Q. Now, did it have an arch on it at that time? A. That was on D-8.

Q. Well, what kind of an arch was on the D-8 at that time?

A. That is an arch, that is all I can tell, it is an arch to haul the log, hang up four or five logs, six or seven, whatever they want and that is to keep them off the ground and drag them out wherever the pond is.

Q. And that arch was on the D-8? A. Yes.

Q. Did you have any arch on that D-8 when you turned it over down there? A. No.

(Testimony of Bruno Agostino.)

Q. Was the arch attached to the cat at the time you saw it? A. Yes.

Q. Was it in a position that it could be worked for handling logs? A. Of course it could.

The Court: Court will stand in recess until 3:47.

(Short recess.)

The Court: The record will show all members of the jury present without exception from counsel.

Q. (By Mr. Bell): Bruno, you heard Mr. Butcher testify here yesterday?

Mr. Boochever: Your Honor, I believe I had started to examine the witness.

Mr. Bell: I didn't know you had started at all. I asked him a question and was conversing with Mr. Ross.

Mr. Boochever: Possibly I am mistaken in that. I don't mean to be rude but I didn't intend to stop him.

The Witness: Yes.

Q. (By Mr. Bell): Why did you leave Mr. Butcher and go to Mr. Ross as attorney?

Mr. Boochever: Object to that as immaterial what his reasons are.

The Court: Objection sustained.

Mr. Bell: Exception.

Q. Did Mr. Butcher do the things you asked him to do in regard to this case?

Mr. Boochever: Object to that, Your Honor.

The Court: Objection is sustained.

Q. (By Mr. Bell): What time did you go to

(Testimony of Bruno Agostino.)

Mr. Ross or approximately what time of the year did you go to Mr. Ross?

A. Well, that must have been around the 1st of August, first of August—last of July, I never keep a date. [570]

Q. Mr. Butcher has not been your attorney since that time, do you mean? A. No.

Q. And is he your attorney now in any way?

A. Mr. Herman Ross and you.

Q. Bruno, you know the Ellamar Packing Company people—Mr. Brown? A. What?

Q. Do you know Mr. Brown of the Ellamar Packing Company? A. Yes.

Q. Do you know what position Mr. Brown holds with the Ellamar Packing Company?

A. He is Vice President of the Company.

Mr. Boochever: I object to that, Your Honor, unless he shows how he knows it in some proper manner.

The Court: Overruled.

Q. (By Mr. Bell): Do you owe the Ellamar Packing Company anything on that D-8 caterpillar tractor?

Mr. Boochever: Object to that question as being a self-serving statement.

The Court: Overruled, you may answer.

The Witness: No, I consider that he owe us money and I call him attention——

The Court: Never mind, you have answered.

Q. (By Mr. Bell): Did you have a conversa-

(Testimony of Bruno Agostino.)

tion with Mr. Brown down at Barry Arm in 1946?

A. 1947, 8th of June.

Q. And where was that conversation?

A. Right in Barry Arm.

Q. Was it about this RD-8 caterpillar tractor?

Mr. Boochever: Object to that question as leading, Your Honor.

The Court: Overruled.

The Witness: Yes.

Mr. Boochever: I think it is leading.

The Court: It is leading unquestionably but I think the asking of a leading question is not harmful and may save a bit of time under these circumtances.

Q. (By Mr. Bell): Bruno, what did you pay for that altogether for that RD-8 caterpillar?

A. Well, we pay $4,000 in cash and we gave him 55,000 feet—they take away to the mill and 115,000 feet piling that has been lost and that was the argument that he no receive the piling.

Q. Bruno, did you notify him that you had the 115,000 board feet of logs in the pond for him?

A. Yes, we did, we had that in three different times.

Q. And did he ever come and get them? [572]

A. No.

Q. Were they lost in a storm?

A. They were lost there in front of the camp—big storm coming break the cable and they went.

Q. How long was it after you had notified him

(Testimony of Bruno Agostino.)

to come and get them that the cable broke there?

A. Well, we notify him that is 1945, 1944 and 1946, that is the last time. I wrote three letters and I never get the answer. We lost 70,000 feet.

Q. And they were tied up there for him all during that time? A. Correct.

Q. Now, then, did you have a controversy with him about that caterpillar whether you owed him or he owed you in over-payment? A. Yes.

Q. Did you both threaten to sue?

A. Yes, we——

Mr. Boochever: I object to that—what he threatened to do is hearsay and threats are immaterial.

The Court: Not hearsay. Overruled.

Mr. Davis: Hearsay as far as we are concerned.

Mr. Boochever: What any third party threatened to Mr. Agostino would certainly be hearsay, Your Honor.

The Court: Overruled upon that ground.

Mr. Boochever: We also object on the ground it is immaterial, irrelevant and incompetent. [573]

The Court: Upon that ground it is sustained.

Q. (By Mr. Bell): Mr. Agostino, then, have you filed a suit against him in this Court that the Gentlemen for the defendant offered part of it in evidence here? Did you file that suit or cause it to be filed? A. I think so.

Q. And that suit is now pending, is it?

A. Yes, sir.

Q. I believe there has been introduced in evi-

(Testimony of Bruno Agostino.)

dence here something about a suit that you filed against Ray Grasser in 1947, and I will ask you tell the jury what that suit is about?

Mr. Boochever: I object to him, Your Honor——

Mr. Bell: You introduced it.

Mr. Boochever: The complaint speaks for itself in that respect.

,The Court: Objection is sustained. We cannot try these other suits in this action.

Mr. Bell: It is liable to prejudice the jury by not having it explained since part of it is introduced, Your Honor?

The Court: The complaint is in and it went in without objection.

Q. (By Mr. Bell): You do owe Ray Grasser some money, do you? A. Yes. [574]

Q. And have you ever disputed the fact that you owe him some to anybody? A. Yes.

Q. And why is it that you refuse to pay him that money?

A. I never refuse to pay him.

Mr. Boochever: Object as immaterial, irrelevant and incompetent why he refuses to pay Mr. Grasser money.

The Court: Overruled.

Q. (By Mr. Bell): Now you may state?

A. I never refuse to pay.

Q. Now, then, I will ask you if that $3300.00 that is mentioned in the contract and the check

(Testimony of Bruno Agostino.)

which was shown here in evidence was for the purpose of settling with Ray Grasser?

A. Correct.

Q. Now, then, did he have any right or bill of sale or mortgage or anything like that on your donkey engine and the other caterpillar down there?

A. No right, whatever.

Mr. Boochever: Object, that asks for a conclusion of law as to whether he had any right.

The Court: Overruled.

Q. (By Mr. Bell): And did you give him any permission to go down there and take any of that equipment? [575] A. No permit.

Q. Did you even know that he had taken it until Mr. Morgan testified to it? A. Correct.

Mr. Bell: You may take the witness.

Further Recross-Examination

Br. Mr. Boochever:

Q. You knew that Ellamar Packing Company was claiming that you owed them money on their tractor, didn't you? A. No, sir.

Q. Well, now, you have a complaint that you have filed against them, isn't that right?

A. I have filed for the bill of sale.

Q. They have never given you a bill of sale for. it, had they?

A. No, trial is not through yet, I don't know.

Q. You have never gotten the title to it?

A. Not it quite.

(Testimony of Bruno Agostino.)

Q. Did you ever tell Mr. Morgan that you did not have the title to it? A. No.

Q. What was your answer?

A. I said "No" because he never ask me.

Q. But you never told him that?

A. He never asked me. I considered that it was paid.

Q. Now, you testified—I would like to show you a picture [576] here, it is Plaintiff's Exhibit 25, and ask you what that picture purports to show?

A. That is the garage.

Q. And is that your caterpillar tractor?

A. Why, sure, that is my cat, and this is the donkey right there.

Q. And is that the D-8 tractor?

A. That is D-8 tractor in here.

Q. The D-8?

A. D-8 right there. That is all black. You can only see that. The other picture show the other cat in front.

The Court: Is that the D-7?

The Witness: D-8 in here and the other cat is inside.

Q. (By Mr. Boochever): And that picture is one you took at the end of May or the 1st of June with Mr. Butcher, isn't that right, Mr. Agostino?

A. That is correct.

Q. There is no blade shown on that tractor, is there?

A. The blade, you take the blade off when you

(Testimony of Bruno Agostino.)

no use it because you use a cat to log and you don't need a blade.

Q. Now I believe you said something about seeing one of your tractors later in September or in August, I believe you said, with an arch on it, is that correct? A. Correct.

Q. Did you take a picture of that? [577]

A. Yes.

Q. I show you plaintiff's Exhibits 27 and 28 and ask you if these are the pictures that you took of that? A. Yes.

Q. That is your cat? A. I take that, too.

Q. That is Columbia Lumber cat here?

A. Yes.

Q. So picture marked 28 is the one that shows it, is that right? A. Yes.

Q. Now, I want you to look at this closer and see if you can't tell that there is no arch connected with that tractor at all there?

A. I say that is his cat and these—that arch in there on your cat.

Q. The arch is on Columbia Lumber——

A. And there is the one on my cat.

Q. There is one on your cat?

A. Pick out one of the other pictures.

Q. Is this the one you mean?

A. No, sir, that is another one. Pick out the other one.

Q. I will give you all the small pictures that are here, you pick it out.

(Testimony of Bruno Agostino.)

A. That is the D-7.

Q. Is there any arch on that? [578]

A. No, I don't say there is any arch. That is your cat and this is the D-8 right there. That is the arch right there.

Q. But that arch isn't connected to the D-8?

A. That was connected down at the bottom. That is behind the cat right there. This is the cat's housing, these all go behind the cat.

Q. In other words it doesn't show the cat at all?

A. What do you call this, isn't that the cat?

Q. This one right here is the cat? A. Yes.

Q. Where is the arch?

A. There is the arch right there—see the arch right there. Show that to the jury.

Mr. Boochever: This here is what he says is the arch and here he says is the cat.

Q. You had better show them on that because I don't want to misrepresent them on that.

A. Well, Gentlemen and Jury, this is the arch. See, they got the whole by itself. This is connected behind the cat and this is the cat track here. The cat go that way and right behind and whatever the arch.

Q. Which cat is your cat?

A. This one here is only one cat and this is the arch. There is nothing else there. Show to all the jurors. Some of them maybe know how the cat work. [579]

Q. Do you know, Mr. Agostino, that an arch is

(Testimony of Bruno Agostino.)

never put on the front always put on the back?

A. That is on the back end, that is not on the front end.

Q. I don't understand the picture that way but that is for the jury to decide.

A. You don't see it?

Q. Are there one or two cats in that picture?

A. One cat.

Juror Fenn: Are there two cats in that picture?

The Court: You will have to ask the witness.

Juror Fenn: Are there two cats in the picture?

The Court: You may answer the question.

The Witness: This is the cat. This is the carriage, what we call an arch. You see these wheels are here belonging to the arch. The arch is connected, draw-bar here behind the cat.

Juror Fenn: It is two different units?

The Witness: Two different units here.

Juror Farrell: Which way was the cat traveling?

The Witness: Traveled that way.

The Court: What was the answer, are there two cats shown in the picture?

The Witness: No, just one cat, Your Honor.

Q. (By Mr. Boochever): Now, Mr. Agostino, in regard to that sawmill, what you call your sawmill, when did you buy that? [580]

A. We buy that 1943.

Q. In 1943? A. Yes.

(Testimony of Bruno Agostino.)

Q. And then you put it out there on that platform?

A. We don't take it until 1944 up to there and then we put it up.

Q. And it has been sitting out there ever since?

A. Well, we never started. We had a tie contract with the railroad here and then they told us that we got no facilities to load it here in Whittier and we no started yet.

Q. My question was—the sawmill since you put it up there has been sitting there ever since?

A. Yes.

Q. I believe you testified that you went to Mr. Ross about the end of July or 1st of August?

A. Yes, sometime after I quit Mr. Butcher I went to him.

Q. Actually that was the end of August—the 1st of September?

A. I couldn't give the exact date, around in there.

Mr. Boochever: No further questions.

Mr. Bell: I would like to ask one further question.

Mr. Boochever: Your Honor, unless it is connection with the cross-examination we wish to object.

Mr. Bell: I forgot to ask him about this new map which was drawn by another witness. [581]

(Testimony of Bruno Agostino.)

Further Redirect Examination

By Mr. Bell:

Q. Mr. Agostino, I had you a paper that is marked Defendant's Exhibit "F", a sketch, I will ask you to state—study that over a little bit—and ask you to state if that correctly shows the condition at the mouth of Mosquito Creek?

Mr. Boochever: I must object as improper redirect examination.

The Court: I know, but it will be admitted.

The Witness: I have got no idea what that map is.

Q. (By Mr. Bell): Assuming that the top of the map is north and that this is Mosquito Creek, does that look anything like the mouth of the Creek there?

A. No, sir, Mosquito Creek it comes around and go the clear to the west into the ocean.

Q. Now, then, I call your attention again after examining that to this map that you have prepared here and ask you to state which one of those represents the condition at the mouth of Mosquito Creek best—the map you have drawn or that other map?

Mr. Boochever: Object to that as improper rebuttal testimony and further that if there is any comparison to be made this witness hasn't qualified to make such a comparison.

The Court: Overruled. [582]

The Witness: This is the creek.

The Court: Just answer the question, Mr. Agostino. The question is—which of those maps most

(Testimony of Bruno Agostino.)

nearly accurately represents the actual situation of the mouth of Mosquito Creek and vicinity?

The Witness: This is the correct one. It is not by scale but they have a picture of the country.

Q. (By Mr. Bell): That is the one that is Plaintiff's Identification No. 2 in Exhibit No. 2?

A. Correct, this is the road here.

Q. Is Mosquito Creek from the mouth on up straight anywhere?

Mr. Boochever: Your Honor, I object to this as being improper at this time because the witness who made that other map testified that he drew the lines straight but it was not a straight stream. He told that and qualified it in introducing it in evidence.

The Court: Objection is sustained.

Q. (By Mr. Bell): Bruno, have you been up Mosquito Creek as far as the Columbia Lumber Company's camp up there? A. Yes.

Q. Does the tidewater go up that high?

A. Yes.

Mr. Boochever: Your Honor, I must object to this as being [583] entirely improper at this time.

The Court: Objection is sustained.

Mr. Bell: Exception. That was testified to in defense and I haven't had an opportunity to deny it. They stated that tidewater went on up above and I want to show that it doesn't.

The Court: I think it was tesified to in direct examination but in view of counsel's statement the

(Testimony of Bruno Agostino.)

ruling will be set aside and he has answered and it——

Mr. Boochever: I don't want to keep bothering and I wish he was told the camp and another time, another place——

Mr. Bell: I didn't know.

The Witness: I said the Columbia camp.

Q. (By Mr. Bell): I never knew of but one Columbia camp, what camp are you referring to?

A. That is the camp of Columbia there up in the creek. It is about a mile from my camp.

Q. Does the tidewater at time of highest tide get up that high?

A. Yes, he no reach to the bend but the creek would be about 7 or 8 feet of water.

Q. At high tide? A. Yes.

Q. How wide would the creek be there?

A. Further up you go to its mouth it is about 10 or 11-feet [584] wide.

Q. And in low tide what is the condition there where the Columbia Lumber Company's camp was when you last saw it?

Mr. Boochever: I object to using "the Columbia Lumber Company camp" if he further modifies——

The Court: Isn't it the Columbia Lumber Company camp now? Whatever camp it is the jury will understand they are talking about the camp that is now occupied.

(Testimony of Bruno Agostino.)

The Witness: There is only one camp, I don't know how you want to call it.

Q. (By Mr. Bell): What is the condition of the creek in low tide?

A. When the tide is out you can cross it with shoepacs, that is about foot or foot and one-half or 7 or 8-foot wide.

Q. You could wade right across in your shoepacs? A. Yes, sir.

Mr. Bell: I think that is all.

Mr. Boochever: No further questions.

The Court: That is all. Another witness may be called.

Mr. Bell: We rest, then, Your Honor.

The Court: Any sur-rebuttal?

Mr. Boochever: No sur-rebuttal.

The Court: Both sides rest?

Mr. Bell: Your Honor, I don't want to rest until those things are read. They offered them but did not read them to [585] the jury.

Mr. Davis: I thought that it was stipulated both counsel could read them without argument.

The Court: If counsel insist on having them, otherwise they may be read during argument.

Mr. Bell: That is all right.

The Court: Next thing under our practice is instructions to the jury.

Mr. Davis: Now, Your Honor, before any instructions we have some motions we would like to make.

The Court: Jury may retire to the jury room until recalled.

Mr. Davis: If the Court please, briefly we wish to renew the motions which were made at the close of the plaintiff's case the other day—a motion for a directed verdict for the defendant and a motion of non-suit as against the plaintiff, the grounds being that the plaintiff has not proved his case here and that is there is no proper matter to go before the jury.

* * * [586]

The Court: Will counsel suspend, it is apparent we cannot go very much further tonight and I hesitate to keep the jury detained upstairs.

Jury may be recalled.

The Court: Record will show all members of the jury present. Ladies and gentlemen of the jury it is apparent that questions of law which are being discussed by counsel will take some little time and I think that it would be an imposition upon you to keep you here when we may not be through much if at all before five o'clock. Therefore, you may now retire and the trial so far as you are concerned will be resumed tomorrow morning at 10 o'clock. In the meantime you will remember the provision of the law which forbids you to discuss the case among yourselves or with others or to listen to any conversation about it and not to form or express an opinion until it is finally submitted to you. You may now retire and report tomorrow morning at 10 o'clock.

The Court: Is it the desire of counsel to have this reported?

Mr. Boochever: No.

Mr. Davis: I have no particular desire.

Mr. Bell: I have none whatever.

The Court: The reporter may be excused.

(Whereupon, at 5:00 p.m., Monday, June 6, 1949. the taking of notes of the case on trial was suspended until 10:00 a.m., Tuesday, April 7, 1949.) [607]

Tuesday, April 7, 1949

(Whereupon, at 10:00 a.m., the above-entitled matter came on for taking of testimony.)

The Court: Clerk may call the roll of the jury in the box.

(Names of jurors were called by the Clerk and responded to as they were called.)

The Clerk: They are all present, Your Honor.

The Court: Motions interposed before we adjourned last night are all denied. Exceptions may be noted to the rulings of the Court.

Next thing in the course of the trial is the reading of the instructions to the jury.

Mr. Bell: Your Honor, may counsel approach the bench before the instructions are read?

The Court: Counsel for both parties may approach the bench together with the reporter.

Mr. Davis: Instruction 6-D, it talks about there being a independent [610] logging contractor and apparently leaves it to the jury to decide whether there was an independent contract—whether Lambert was or was not an independent contractor. It is our theory the evidence in the case is absolutely undisputable by any of the parties standing before the Court admittedly that under the evidence before the Court that Lambert under the law is an independent contractor.

If I am wrong, Your Honor, then I feel that we should give an instruction of what is an independent contractor because there is no standard at all set forth there for the jury to find how you determine an independent contractor or what authority an independent contractor has.

We presented a minute ago a proposed instruction about an independent contractor. We only prepared that in the event that the Court ruling stands that the jury is to find out whether or not Lambert is an independent contractor. We think that is a quetsion of law.

The Court: I am going to put the question to the jury, but I think it is quite right in asking the Court to define an independent contractor.

During the course of the argument I shall try to get some unassailable statement of law and give that to the jury later.

Mr. Bell: Now, Your Honor, my contention, of course, is that Lambert was not an independent con-

tractor; that he was a wage worker on piece work.

The Court: I am putting that to the jury.

Mr. Bell: And I believe if you put one part of it you should put both parts in your instructions that if he was a piece worker and using your equipment and handling their timber that he would not be an independent contractor.

The fact that the price was fixed based upon delivery of logs would not make him an independent contractor, that he would be an employee the same but on piece work, and, of course, that is my contention. Now, there are a lot of exceptions that I think I want to raise but I don't want to raise them now.

Mr. Boochever: Your Honor, there is one other point I would like to add and that is if this Instruction 5-B about third persons taking that property, which if counsel says in effect removes that, I feel that a directed verdict should be given at least as to the two tractors and the donkey machine in view of the fact—I feel that a directed verdict should be given at least as to the two tractors and the donkey machine in that the plaintiff, Agostino, and the witness, Lambert, and every other witness testified that they were not touched or used in any matter or form until after the July contract and the jury will absoutely be wrong in saying that there was an implied contract of sale by the taking possession of those items of property and assessing damages on that, and it would be absolutely improper for them to do that.

The evidence shows conclusively he turned it all over to [612] him when he walked out.

* * *

I have noticed as I went along that in several of the instructions the word "plaintiffs" was plaintiff" instead of "plaintiffs." Wherever I use the word "plaintiff" you will understand that I refer to the two plaintiffs in this action and the instructions will be amended accordingly. I assume counsel has no objections to putting an "s" on the word "plaintiff" wherever it appears.

Counsel and the reporter may come to the desk to take exceptions to the instructions. The plaintiffs will take exceptions first.

* * * [646]

The Court: Counsel for defendant may take exceptions.

Mr. Davis: Your Honor, in Instruction 3, page 2, line 8, 9 and 10 as given, the Court uses the following language "* * * and denies that plaintiffs gave to the defendant at its request possession of all of said property and denies that defendant thereby became indebted to the plaintiffs and obligated to pay * * *" that is not complete but that shows what I am interested in.

The Court: What do you except to?

Mr. Davis: I except to the matter of using possession of all of said property. I believe that we have not only denied that they gave us all of it but we denied that they gave us any of it.

Mr. Bell: I woud have no objection to Your Honor adding the word "all or any."

Mr. Davis: All or any would be satisfactory to me.

The Court: I will write the word "all or any."

Mr. Davis: Your Honor, on Instruction No. 4 as given, commencing with line 9 and ending with the end of the first paragraph it is set forth that oral contracts—personal property—[651] if proved, may be just as valid and enforceable as though it were written. I think the instruction is probably correct except that it is misleading in view of the fact that the statute of fraud is not set forth at that point. You did set forth statute of fraud and I believe it was in Instruction No. — but as written here it says that they are just as valid and enforceable as though in writing and that is not true, I think, at that point except as governed by the statute of fraud set forth in Section 6 or something in that order.

The Court: I think it is sufficiently covered. And, then, there is the instruction that the instructions should be considered as a whole and the jury shouldn't single out any one single instruction to the exclusion of the others.

Mr. Davis: My thought is being in there at that particular and then the statute of fraud stands by itself and then the jury will probably overlook it.

I would like to except to the giving of that portion of Instruction No. 4 contained in the last paragraph of that instruction or the last paragraph

of the first page, begins in this case "* * * there is not sufficient evidence * * *" and on to the end of the paragraph for the reason, Your Honor, it is our contention and I believe the evidence shows that there wasn't either an express agreement or an implied agreement at the time and place in question and that anything about price was just as fully discussed as anything else; that if [652] there was any price it was fully discussed by the parties. The question is as to whether or not there was any agreement and it is our contention that as a matter of law there wasn't any agreement, express or implied at all either for reasonable value or for $25,000 or any other agreement.

I would like to except to the giving of the last paragraph of Instruction 4 continued for the reason that it does not set forth the dates in question on or about March 24th. It leaves it open to say that we might have taken possession of that property in December or this year or some other time and would find a contract from that point.

The Court: I think that may be a good objection.

Mr. Davis: I would suggest that after the words "that the plaintiffs" between the plaintiffs and sold that "the plaintiffs on or about March 28 sold * * *".

The Court: I will insert that.

Mr. Davis: Then I would suggest that in line 10 between the words "defendant" and "accepted" we put in the date again.

The Court: I think that is good.

Mr. Bell: I would like to except to that.

The Court: You have your exception, of course.

Mr. Davis: I would like to except to certain portions of Instruction 5 as given. I have written over the plaintiffs' exception and I have a hard time finding them there. It is our contention, Your Honor, you have gone too far here as to what [653] possession a person has on so-called tidelands. It is our contention that by the law a person has only the right to use tidelands including the—between high tide and low mean and he only has the right to use lands in common with anybody else unless he has permanent improvements of some kind which excludes other people from possession. I don't believe that it is correct to say that a person may claim a pond, as we have here, claim the whole pond—not using it but claiming and therefore you can't go in and claim that tideland, that is the crux of this whole case—they claim we took possession by using that pond.

The Court: I think the tideland——

Mr. Davis: That is true, but that was on one little portion of that pond.

Mr. Bell: It is around the edge of the pond—he is clear across.

The Court: I relied here on the case of Harness versus Petersburg. I think it was reported in 260 Federal.

Mr. Boochever: Didn't Your Honor, think that there should be a statement in there that it is only

to the portion of the tidelands on which the plaintiff has useful improvements?

The Court: I said "took possession." I think that is sufficient.

Mr. Davis: That is the important part. We have talked about possession but "possession" to the plaintiff evidently means something far different. I wonder if we shouldn't have [654] a little definition of what it means.

The Court: You will take your exception and I will give it thought during your argument. Right now I don't see that it needs any elucidation.

Mr. Davis: I would like then to except to the latter paragraph of that Instruction 5 insofar as the talked about claim of possession without defining what "possession" is and on the ground we had with plaintiffs equal right to use those tidelands with the plaintiffs except insofar as they have excluded them from the public domain.

Mr. Boochever: There is no where stated—It states in line 11 that if you find in this case that plaintiffs were in the actual possession and use of any tidelands then in that event they were entitled to remain in possession thereof as against all other claims or claimants seeking possession of such tidelands from the plaintiffs, because it is a well established law that the United States has paramount title to the tidelands and a right under the United States.

The Court: If you mention the United States and mix it up in it is just one more thing for the

jury to consider and the United States is not involved in this case at all. Counsel is quite correct as to the law but I don't see how—why the instructions should properly make that exception in the case of the United States.

Mr. Boochever: Well, at least as far as the public lands [655] above tidelands, the rights of the United States are of great relevancy and the rights of each and the rights of each, we feel, is very essential, which should be stated in this case as it goes to the very essence of this argument.

The Court: I think that is covered in the last part of 5. However, you have your exception.

Mr. Davis: Your Honor, we would like to except to the giving of the first paragraph of 5-A for the reason that in that instruction the Court has allowed the jury to find out as to whether or not there was an implied contract and allowed the jury to speculate on reasonal value. It is our contention that we have, further, previously set forth in argument before the Court, that the evidence shows conclusively that there was no contract of any kind to buy or sell property. The minds of the parties did not meet and, certainly, there wasn't any evidence of any kind that the parties contracted on the basis of reasonable value. The only evidence is that one man made an offer to sell for $25,000 and that offer was rejected, or, possibly I should say that on or about March 24th that there was a discussion—promise that there would be further negotiations and then it was rejected. I think it is

improper for the Court to let this matter go to the jury on the basis of quantum valebant theory.

I would like to except, Your Honor, to the giving of that portion of Instruction 6-A commencing in line 7. I believe it [656] is "* * * as a matter of law" ending on line 14 "* * * on or about March 24, 1948," for the reason that you have ruled out there—the written agreement. You have held that as a matter of law that that written agreement is not sufficient to constitute a bar to the enforcement of the alleged oral contract. Of course it is our contention that there wasn't any oral contract and that the written contract was the only contract entered into between the parties. But, as a matter of law, I don't think it can be said that the written contract did not bar a contract made in March for several reasons. In the first place the written agreement on the face of it purports to be all the negotiations between the parties, to contain the full agreement between the parties, and the written agreement was the agreement between the parties and I think as a matter of law it should not be ruled out as a bar to the so-called agreement in March.

I would like to except to the giving of Instruction 6-C insofar as it leaves it open to the jury to speculate as to whether or not Kenneth D. Lambert was an independent contractor. It appears to me clear from the evidence—from all the evidence, from the indisputed evidence—that Kenneth D. Lambert was an independent contractor.

I would like to except to the giving of Instruction 6-D on the same ground. They are comparison instructions. We feel it is an error on the part of the Court and highly prejudicial to us to let the matter go to the jury speculating whether [657] or not Lambert was an independent contractor. I think the Court should find as a matter of law that he was and that his actions did not bind the defendants in this case and any material or equipment he took after March 24th or after April 2nd, I guess it is, would not be binding on Columbia Lumber without some showing of authority which hasn't been shown here, in fact to the contrary, it is shown particularly that it didn't have any such authority.

I think that covers it, except I might suggest that the Court make three forms of verdict here instead of two. I think it may be just a little bit confusing here. We might have a verdict for the plaintiff in the blank amount that you have it; a verdict for the defendant without any amount; and then a third form of verdict for the defendant in his counter claim, if any. I think that the way it is set up might be somewhat confusing to the jury.

The Court: I will give it consideration.

Mr. Davis: Your Honor, in this case we requested 33 separate instructions on behalf of the defendant; two of those instructions were not handed to Your Honor until this morning, and I don't think you have yet had time to consider them.

The Court: I shall refuse to give 32 because it comments on the evidence.

Mr. Davis: The reason for asking for 32, Your Honor, is the fact that it has been set forth in the complaint "connivance [658] and scheme" and so forth. We move to strike that portion as to conclusions of law and prejudice when the Court didn't agree with us on that point. There hasn't been any evidence. We feel it is highly—and some sort of instruction of that kind ought to be given.

Mr. Bell: There was substantial evidence to show it.

The Court: I shall consider it further in view of counsel's statement. The one on independent contractor I have not read and it may be given or refused.

Mr. Davis: We would like to except, Your Honor, to the failure of the Court to give instruction No. 4 as requested by the denfendant for the reason we believe that that correctly states the law and should properly be given under the evidence in this case.

We would like to except to the failure of the Court to give requested instruction of the defendant No. 6 on the same ground and for the same reasons and the same as to requested instruction No. 7 of defendant.

It is apparent that we are going to have to discuss damages in this case and the jury may get the idea that since we discussed damages in this case and the jury may get the idea that since we dis-

cussed damages in argument that we must feel that they are entitled to damages which, of course, we do not. We can argue it but I am afraid merely by discussing it we may be admitting some liability for damages. [659]

Your Honor, we except to the failure of requested instruction, defendant's No. 9, that has been covered in part by other instructions but in this case it is apparent from the evidence here that this case is going to hinge pretty largely on sympathy, on prejudice, and we feel we are entitled to a particular instruction on that point—on the facts as disclosed by the evidence in this case.

Requested Instruction No. 10, I think, is about the same as Requested Instruction No. 8. The same general matter is covered by it. If one is given then, of course, we wouldn't require both of them, but we think something should be given on that subject.

Instruction 11 is the same way, it is a companion instruction.

We think requested Instruction No. 12 is a proper instruction under the evidence of this case and should have been given by the Court—that the plaintiff must not only prove in this case that there was an agreement but how much, if any, he has been damaged by failure to go through with the agreement.

Your Honor, requested Instruction of the Defendant No. 14, has to do with independent contractors and Kenneth Lambert, as previously mentioned we feel that we are entitled as a matter of law to

an instrutcion that Lambert was an independent contractor. We also feel that we are entitled to an instruction of the Court that Lambert's employment was such prior to the [660] time that he started as an independent contractor that he wasn't entitled to bind the defendant on any sale or attempted sale or purchase or anything of that nature. We feel that the evidence is undisputed in that respect and that it is improper to let that matter go to the jury without an instruction on it.

Mr. Davis: Your Honor, I passed up apparently our requested Instruction No. 13 which the Court originally made up as your Instruction 5-B which I believe you are now going to modify. We feel that the matter set forth in that requested instruction is proper—a proper statement of the law and proper to the facts of this case, and while, of course, if the Court modifies we might be satisfied with the modification we certainly——

The Court: You had better take your exception.

Mr. Davis: I am taking exception to the failure to give our requested Instruction No. 13. I had better, maybe, be a little more specific on that. We feel, your Honor, that under our theory of the case that the only possession taken of any property by the defendant was taken under the agreement made at the last of June, that the agreement was not consummated, we feel, by a result of the failure of the plaintiffs to go through with it but at any rate it is admitted all the way around that it was not consummated. We feel under those circumstances

we were entitled to rescind and redeliver the property and that we did redeliver it and that after that time if any property [661] it was taken away by a third party we were not responsible for it and I think there should be instructions along that line.

We would like to except to the failure of the Court to give our requested instruction No. 22 which has to do with this pond—I am sorry, Instruction No. 20—this pond and these tidewaters. I have already fairly well covered that in the exceptions I took to the instructions as given by the Court, but we feel that Instruction No. 20 as written properly states the law and properly states the law that should be given under the evidence in this case. We would like to except to the failure of the Court to give our requested Instruction No. 21 for the reason we believe that that requested instruction, while you have given it in part, we feel that the part that you have left out is material to the consideration of the jury under the evidence of this case and properly states the law in connection with it and by failing to give all of the instructions you have left out some points that should be covered.

We would like to except to the failure of the Court to give our requested Instruction No. 22 for the reason that it is undisputed that the defendant redelivered this property back to the plaintiffs' property and that the plaintiffs did nothing at all to protect their property; that some third party not connected with the defendant in any way took the

property away and we feel we are entitled to an instruction that under those circumstances that it was the duty of the plaintiffs to use [662] due care to protect their property, that if they didn't use due care that we are entitled—that they are not entitled to recover against us by reason of that.

We would like to except to the failure of the Court to give our requested Instruction No. 24 on the ground that the undisputed evidence is that Lambert at the time the gasoline was borrowed was not even an employee of Columbia Lumber Company. By all the evidence he was an independent contractor at that time; that it is apparent from the evidence that Lambert borrowed that gasoline on his own hook, that he borrowed it not by any direction of the defendant but by permission of the plaintiffs and under those circumstances the defendant should not be held liable for that gas and oil as not any evidence at all that there had been a sale.

I would like to except to the failure of the Court to give our requested Instruction No. 26. We feel, your Honor, that in order to establish anything at all the burden is on the plaintiffs to show that there was an agreement and that possession was given at the time in question—March 24, 1948 or thereabouts, in accordance with their complaint and that to leave it speculative that possibly taking possession under some other deal some months later is improper to let it go to the jury under those circumstances.

We also take the position that the only thing in

evidence about possession at all was that we took possession of certain [663] tidelands which we feel that under the evidence and under the law we had a perfect right to do.

I would like to except to the failure of the Court to give our requested instruction No. 27 because of the fact that it does appear without question that the plaintiffs as late as May of this year, over a year after the date of the alleged sale, did say that they were the owners of the tractor in question; that either plaintiffs or—if the sale was made, if they are—I will back up. If the plaintiffs are as they claim in this Third Amended Complaint in the Ellamar Packing case, if they are the owners of that tractor then they certainly are not the real parties in interest in this case so far as the tractor is concerned.

Mr. Bell: At this particular point we wish to call the Court's attention that the Ellamar Packing suit was filed——

The Court: Wait a minute, let counsel proceed.

Mr. Davis: I would like to except to the failure of the Court to give our requested Instruction No. 28 in behalf of the Defendant or at any rate—maybe that is too broad the way it is—but I think the Court should give some instruction to the effect that allegations that are not denied by the answer are admitted to be true. Now, possibly in setting it down to that particular section we were wrong but the Court should give some instruction to that

point so that the jury will know and we can argue it. [664]

We consider, your Honor, that the Court pretty well covered requested Instruction No. 29. We take no exception to that.

We would like to except to the failure of the Court to give our requested Instruction No. 31. While it is true that the Court has given the law which is there setting—there set forth in just stating the statement of law, that it is not covered as applied to the facts of this case and we believe that this particular requested instruction should have been given rather than the instruction concerning the law of sales and the law of recission of sales.

At this time, then, your Honor, I would like to except to the failure of the Court to give our requested Instructions Nos. 32 and 33 which I realize the Court hasn't had a chance to consider fully yet. I will take exception at this time and then later if the Court——.

Mr. Bell: They are the two that were typed as requested—they were the two that were penned?

The Court: Ladies and Gentlemen of the Jury, as a result of conference with counsel two amendments have been made to the instructions, one is Instruction 3 on page 2, the text read before. This is a recitation of the claim of the defendant and the text reads " * * * denies that plaintiffs sold to the defendant the property described in said Second Amended Complaint and denies that plaintiff gave

to the defendant at its request [665] possession of all of said property * * *" That was obviously an error and I have inserted the words "or any" so it now reads "* * * all or any * * *." The defendant denies that the plaintiffs gave the defendant all or any of the property.

And, again, in Instruction No. 4 on the second page thereof, the page being marked "4. (continued)", so that you would not make a mistake and think that the instructions referred to June or July. As now written the last paragraph reads as follows: "So in this case if you find from all of the evidence and by a preponderance thereof, and under these instructions as to the law, that the plaintiffs on or about March 24, 1948, sold and delivered the property in question to the defendant and the defendant accepted said property and took possession thereof, the law implies a promise on the part of the defendant to pay the reasonable value of the property, that reasonable value to be determined by you from the evidence in the case, but in no event to exceed $25,000.00."

You will observe that the correcting language has been written in in ink.

It may be that later as a result of converence with counsel I shall give further instructions but that is not now certain.

The Court now stands in recess for ten minutes until ten minutes of twelve.

(Short recess.) [666]

The Court: Without objection the record will

show all members of the jury present.

Do counsel care to submit to any limitation of argument?

Mr. Davis: Your Honor, I think possibly we have been in trial here a week. I think probably we should not entirely submit to limitation of argument. I am going to try to keep it as brief as I can and I feel—but I feel that it is an important case.

The Court: I presume that both of counsel on each side will desire to argue?

Mr. Bell: Your Honor, would you permit the opening argument by the plaintiffs to be made by two counsel and closed by one? I mentioned the matter to Mr. Davis who did not agree, however.

The Court: I see nothing unfair in that; in fact a good opening is better for the defendant than to have only a brief opening and then reserve all of the principal arguments for the closing when there is no chance to answer, so unless there is objection I shall permit both of counsel to open and one to close. It is now about nine minutes to twelve and I am wondering what ought to be done. What would suit best the convenience of the jury? Could all of you come back again at 1:00 o'clock or would you prefer to stay until 12:30 or so? I would like to suit your convenience. Some of you may have other obligations, particularly the ladies on the jury. If that is agreeable with counsel we will recess until 1:00 o'clock. [667]

Afternoon Session

The Court: Clerk will call the roll of the jury.

(Names of members of the jury were called by the Clerk and responded to.)

The Court: I think I shall have to put some kind of limitation on counsel and I don't think we would be justified in letting it run over until tomorrow. I think the limitation will be two hours to the side.

Mr. Davis: That is agreeable.

The Court: That ought to be ample and I hope that counsel will be able to give some of it back but I do not urge them to do so.

Do counsel desire to have their arguments reported?

Mr. Bell: No, not for the plaintiffs.

Mr. Davis: No, your Honor.

The Court: Reporter may be excused.

(Whereupon, argument was had by counsel for plaintiffs and counsel for defendant.) [668]

The Court: Now, these instructions which I have just read to you will be fitted into the other instructions which I have given at the proper place.

Counsel will come to the bench to take such exceptions as they desire. Plaintiffs' counsel may take exceptions first. [669]

* * *

The Court: I am going to follow counsel's suggestion and insert "or some part thereof" on page 3 before defendant's counsel take their exceptions.

Mr. Davis: That will be "* * * then accepted and received said——"

The Court: "or some part thereof."

Counsel for defendant may take exceptions.

Mr. Boochever: The only one is in regard to Instruction 5 on page 2 where it states "Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings." We think that after that there should be added "and that the superior right established by such position extends only to such structural improvements and not to unoccupied portions of tidelands" or some such similar provision so that they will understand that a few pilings in a tideland pond does not give exclusive right to the whole pond but only to the portions occupied by the pilings.

The Court: Exceptions will be noted. Now, as to the instructions requested, I have marked each of them refused except as covered by instructions given and exception taken and I have signed it and these instructions will be filed now with the Clerk and may be considered as incorporated in the reporter's notes at this time or as immediately following the taking of exceptions originally, whichever counsel desire. [671]

* * *

Mr. Bell: Either way.

Mr. Davis: Entirely satisfactory with me.

Mr. Bell: Entirely satisfactory with us.

Mr. Boochever: Your Honor, what is your position in regard to a sealed verdict?

The Court: Well, if counsel stipulate there will be a sealed verdict. It is up to counsel. I do not feel that I have the right to impose a sealed verdict unless counsel agree to it.

Mr. Boochever: I frankly would rather not have one because I could leave by seven tomorrow, but I do not want to hold my personal desires in opposition with the Court.

The Court: It doesn't bother me at all. I am a wakeful individual.

Mr. Davis: So far as I am concerned I would prefer a sealed verdict if everybody else is agreeable.

Mr. Bell: I would, too.

The Court: We will not have it unless everyone stipulates.

Mr. Boochever: We will stipulate.

Mr. Bell: We will stipulate.

The Court: I have inserted in Instruction 6 page 3 the words "or some part thereof" those four or five words.

Instructions may be stapled together. Here is the sealed verdict. [698]

Ladies and Gentlemen of the Jury, counsel have stipulated that you may return what is called a sealed verdict, that is to say when you have agreed upon a verdict the foreman may sign it and it will be sealed and the foreman will put it in his pocket and keep it until you meet tomorrow morning at 10 o'clock. I will read you the instructions on the envelope and I think some of you have served on

juries before which have, perhaps, returned sealed verdicts.

The envelope is entitled In the Court and in the Cause and then reads as follows: "Sealed Verdict. Ladies and Gentlemen of the Jury: When you have agreed upon a verdict, have the foreman sign the same, seal it up in this envelope, and keep it in his possession, unopened. You may then separate and go to your homes. No juror must say anything about the verdict agreed upon. All the jurymen must be in the jury box in court at 10 o'clock a.m. of Wednesday, June 8, 1949, at which time the verdict will be handed to the Court and opened in the presence of the jury. Dated at Anchorage, Alaska, this 7th day of June, 1949." It is signed by me as District Judge. Bailey E. Bell and Herman H. Ross as attorneys for plaintiffs; R. Boochever and Edward V. Davis as attorneys for Defendant. So this will go with you with the other papers to the jury room.

Bailiffs may be sworn.

(Oath administered by Clerk to Bailiffs.)

Gentlemen, you will see that the jurors are provided with food and water and liquids other than alcoholic liquids, of course, and that the jury room is kept comfortably warm and furnish any heat that is required.

Ladies and Gentlemen, you may now retire to consider your verdict.

Is there anything further to come before the Court at this time?

(No response.)

The Court: Court stands adjourned until tomorrow morning at ten o'clock. [700]

Wednesday, June 8, 1949.

Whereupon, at 10:10 a.m., the above-entitled matter came on for receiving of the verdict from the jury foreman. [701]

The Court: Clerk will call the roll of the jury in the box.

(Names of the jurors were called and answered to.)

The Clerk: They are all present, your Honor.

The Court: Ladies and Gentlemen of the Jury, have you arrived at a verdict?

Jury Foreman: We have.

The Court: You may hand it to the Clerk. Sealed verdict is now opened in the presence of the jury. Clerk may read the verdict.

The Clerk: In the District Court for the Territory of Alaska, Third Division, Bruno Agostino and Stanley Socha, co-partners doing business under the firm name and style of Barry Arm Camp, plaintiffs, versus Columbia Lumber Company, Inc., a corporation, Defendant. No. A-5207.

Verdict No. I. We the jury duly impaneled and sworn to try the above entitled cause do find for the plaintiffs and against the defendant and find that the plaintiffs are entitled to recover of and from the defendant the sum of Fourteen Thousand Ninety-Two and no/100 Dollars ($14,092.00). Dated at Anchorage, Alaska, this 8th day of June, 1949.

/signed/ George Karabelnikoff, Foreman.

The Court: Ladies and Gentlemen of the Jury, you have heard the verdict, is that your verdict so say you all? [702]

Do any of counsel care to have the jury polled?

Mr. Davis: No, your Honor.

The Court: The verdict may be received and filed and entered and the envelope may be filed.

Thank you for your service, Ladies and Gentlemen. You are now discharged from consideration of this case.

(Whereupon, at 10:15 a.m., Wednesday, June 8, 1949, the Cause No. A-5207 was concluded.)

United States of America,
Territory of Alaska—ss.

I, Oren J. Casey, the Official Court Reporter for the United States District Court, Third Division, Territory of Alaska, hereby certify the above and foregoing to be a true and correct transcript of the proceedings had in the above entitled matter in said Court at the time and place as set forth.

/s/ OREN J. CASEY,
Certified Shorthand Reporter.

[Endorsed]: Filed November 3, 1949. [704]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

1. Amended Complaint.

2. Answer.

3. Second Amended Complaint.

4. Motion to Strike and Make More Definite and Certain.

5. Answer and Counterclaim to Second Amended Complaint.

6. Reply.

7. Motion to Strike Portions of Reply.

8. Defendants' Requested Instructions Number 14, 18, 19, 20, 21, 24, 26, 27, 28 and 29.

9. The Court's instructions to Jury.

10. Motion for New Trial.

11. Motion for Judgment Notwithstanding Verdict.

12. Supersedeas Bond.

13. Notice of Appeal.

14. Motion for Extension of Time.

15. Order Extending Time.

16. Transcript of Record, except the following portions thereof:

From Line 17, Page 187 to Line 22, Page 202.

From Line 19, Page 586 to Line 7, Page 590.

From Line 24, Page 590 to Line 12, Page 607.

From Line 15, Page 609 to Line 25, Page 610.

From Line 1, Page 613 to Line 1, Page 646.

From Line 11, Page 646 to Line 6, Page 651.

From Line 6, Page 669 to Line 2, Page 671.

From Line 1, Page 672 to Line 2, Page 698.

17. Statement of Points.

FAULKNER, BANFIELD & BOOCHEVER,
By /s/ J. L. McCARREY, JR.,
Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 17, 1949.

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska,
Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed pages are the full, true and correct records and files in Cause No. A-5207 in the files in my office; that this is made in accordance with the stipulation of praecipe filed in my office on the 17th

day of October, 1949; that the foregoing has been prepared, examined and certified to by me.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 28th day of October, 1949.

M. E. S. BRUNELLE,
Clerk.

[Seal] By /s/ IOLA FOWLER,
Chief Deputy Clerk.

[Endorsed]: No. 12393. United States Court of Appeals for the Ninth Circuit. Columbia Lumber Company, Inc., a corporation, Appellant, vs. Bruno Agostino and Stanley Socha, co-partners doing business under the firm name and style of Barry Arm Camp, Appellees, vs. Bruno Agostino and Stanley Socha, co-partners doing business under the firm name and style of Barry Arm Camp, Appellants, vs. Columbia Lumber Company, Inc., a corporation, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed November 3, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit
No. A-5207

COLUMBIA LUMBER COMPANY, INC.,
a corporation,

Appellant,

vs.

BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of BARRY ARM CAMP,

Appellee.

STATEMENT OF POINTS RELIED ON

Comes now the appellant above named and makes the following statement of points relied on in its appeal, namely:

1. The verdict as rendered was not supported by sufficient evidence but was contrary to the evidence.

2. The verdict as rendered was against the law.

3. The verdict as rendered was for excessive damages and was given under the influence of passion, prejudice or sympathy.

4. The Court erred in allowing over objection of defendant testimony of alleged oral conversations between one "Blackie" Lambert and plaintiff Bruno Agostino.

5. The Court erred in refusing to strike the testimony concerning the alleged oral conversations above mentioned, and in refusing to instruct the jury to disregard such testimony.

6. The Court erred in allowing the admission of plaintiffs' Exhibit No. 1 over objection of the defendant.

7. The Court erred in allowing the plaintiff Bruno Agostino to testify as to the contents of a telegram alleged to have been received by him from the United States Forest Service.

8. The Court erred in allowing plaintiffs to amend their complaint after the close of plaintiffs' case, and the Court erred in allowing the trial to proceed under plaintiffs' second amended complaint filed after the close of plaintiffs' evidence.

9. The Court erred in denying defendant's motion for a directed verdict made at the close of plaintiffs' direct case.

10. The Court erred in denying defendant's motion for non-suit made after the Court had ruled upon defendant's motion for a directed verdict.

11. The Court erred in refusing to grant defendant's motion to strike portions of plaintiffs' second amended complaint and to require portions of such second amended complaint to be made more definite and certain, the particular portions more fully appearing in defendant's motion to strike and to make more definite and certain.

12. The Court erred in denying defendant's motion to strike portions of plaintiffs' reply made tc defendant's answer to plaintiffs' second amended complaint, such portions more fully appearing from the motion.

13. The Court erred in its refusal to grant the renewal of defendant's motion for a directed verdict at the close of all the evidence.

14. The Court erred in its refusal to grant the renewal of defendant's motion for a non-suit made at the close of all the evidence.

15. The Court erred in submitting the matter to the jury.

16. The Court erred in refusing to grant defendant's motion for judgment notwithstanding the verdict.

17. The Court erred in refusing to instruct the jury as a matter of law that the witness Lambert was an independent contractor from and after April 1, 1948 and that the said Lambert had no authority to bind the defendant to any sale or agreement for sale prior to April 1, 1948.

18. The Court erred in failing to instruct the jury that the written agreement entered into between the parties on or about June 29, 1948, together with the letter written by Thomas A. Morgan on behalf of the defendant on July 19, 1948, constituted a valid and existing agreement between the parties and binding upon the parties according to its terms

except as to plaintiffs' subsequent breach and repudiation thereof, and in failing to instruct the jury that any or all conversations had between the parties prior to the date of the written agreement were merged in the written agreement.

19. The Court erred in failing to instruct the jury as requested in defendant's requested instructions numbered 14, 18, 19, 20, 21, 24, 26, 27, 28 and 29.

20. The Court erred in giving the following portions of instruction No. 4:

(1) That portion of such instruction commencing with line 8 with the words "in case of land" and ending at the end of the first paragraph of said instruction.

(2) That portion of such instruction consisting of the last paragraph of the first page of such instruction commencing with the words "in this case" and ending with the end of such paragraph, and instruction No. 4 continued, ending with the words "says there was not."

(3) That portion of said instruction continued, consisting of the last paragraph thereof.

21. The Court erred in giving that portion of instruction No. 5 commencing on line 5 of such instruction with the words "the law in such cases" and continuing to the end of such instruction.

22. The Court erred in giving instruction No. 5-A.

23. The Court erred in giving that portion of instruction No. 6-A commencing on line 7 thereof with the words "as a matter of law" and ending in line 14 with the words "by March 24, 1948."

24. The Court erred in giving instruction No. 6-D.

25. The Court erred in denying defendant's motion for new trial.

26. The Court erred in denying defendant's motion for judgment notwithstanding the verdict.

Dated at Juneau, Alaska, October 14, 1949.

/s/ J. L. McCARREY, JR.
FAULKNER, BANFIELD & BOOCHEVER,
By /s/ R. BOOCHEVER,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 17, 1949.

No. 12,393

IN THE

United States Court of Appeals

For the Ninth Circuit

COLUMBIA LUMBER COMPANY, INC. (a corporation),

Appellant,

vs.

BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of Barry Arm Camp,

Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANT.

FAULKNER, BANFIELD & BOOCHEVER,
R. BOOCHEVER,
Juneau, Alaska,
Attorneys for Appellant.

FILED

MAR 2 - 1950

PAUL P. O'BRIEN,

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 12,393

IN THE

United States Court of Appeals

For the Ninth Circuit

COLUMBIA LUMBER COMPANY, INC. (a corporation), *Appellant,* vs. BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of Barry Arm Camp, *Appellees.*	

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANT.

VERDICT BELOW.

A verdict was entered in the court below in favor of appellees and against appellant, in the sum of $14,-092.00 (Tr. 97-98). It is from the judgment based on that verdict that this appeal has been taken.

JURISDICTION.

The jurisdiction of the District Court was invoked under the Act of June 6, 1900, C. 786, Sec. 4, 31 Stat. 322 as Amended, 48 U.S.C.A., Sec. 101. The jurisdiction of this court rests on Section 1291 of the New Federal Judicial Code.

QUESTIONS PRESENTED.

1. Was there evidence to support the verdict of the jury, or was the verdict manifestly against the evidence or the result of passion, prejudice, sympathy or mistake?

2. Did the trial court err in giving Instruction No. 5 over appellant's objection, since that instruction permitted the jury to conclude that landing a scow in the unoccupied portion of a tidewater pond in which appellees had placed a few pilings, constituted a taking of possession of appellees' property by appellant so as to complete a sale?

3. Did the District Court err by refusing to instruct the jury that Kenneth Lambert was an independent contractor at all times after April 1, 1948 since all the oral evidence and the written contract executed between the appellant and Lambert could only be construed as establishing an independent contract relationship?

4. Was the alleged oral contract of sale of March 24, 1948, unenforceable as falling within the provisions of the Statute of Frauds, A.C.L.A. 1949, Section 29-1-

12, since there was no such acceptance or receipt as to take the contract out of the statute; and did the court err in giving Instruction 4 which stated "An oral contract for the sale of personal property may at law if proved be just as valid and enforceable as though it were written"?

5. Did the court err in permitting evidence to be introduced of an alleged prior inconsistent oral agreement, since an agreement of sale was entered into between the parties on June 29, 1948, reduced to writing, signed by appellees, and acted upon by appellant?

6. Did the court err in permitting testimony over appellant's objection as to the contents of an alleged telegram purporting to grant appellees a continuation of their timber permit?

7. Did the court err in allowing appellees further to amend their amended complaint after appellees had rested, in view of the fact that the second amended complaint was based upon a substantially changed cause of action?

8. Did the court err in denying appellant's motions to strike portions of appellees' second amended complaint and make more definite and certain, and to strike portions of appellees' reply, since improper allegations highly prejudicial to appellant were permitted to go to the jury by virtue of the court's order denying these motions?

SPECIFICATION OF ERRORS.

The Specification of Errors (Tr. 660), may be summarized as follows:

1. There was no evidence to support the verdict of the jury, which verdict was manifestly against the evidence and was the result of passion, prejudice, sympathy or mistake.

2. The honorable trial court erred in giving Instruction No. 5 over appellant's objection, since that instruction permitted the jury to conclude that landing a scow in the unoccupied portion of a tidewater pond in which appellees had placed a few pilings, constituted a taking of possession of appellees' property by appellant so as to complete a sale.

3. The District Court erred by refusing to instruct the jury that Kenneth Lambert was an independent contractor at all times after April 1, 1948 since all the oral evidence and the written contract executed between the appellant and Lambert could only be construed as establishing an idependent contract relationship.

4. The alleged oral contract of sale of March 24, 1948, was not enforceable because it fell within the provisions of the Statute of Frauds, A.C.L.A. 1949, Section 29-2-12, since there was no such acceptance or receipt as to take the contract out of the statute; and the court's Instruction No. 4 was erroneous in stating under the circumstances of this case that "An oral contract for the sale of personal property may in law if proved be just as valid and enforceable as though it were written".

5. On or about June 29, 1948, the parties hereto entered into an agreement for the sale of the property in question. Since this agreement was reduced to writing, signed by appellees, and since appellant took possession of the property under the terms of this agreement, the court erred in permitting evidence to be introduced of an alleged prior inconsistent oral agreement involving the same transaction.

6. The court erred in permitting testimony over appellant's objection as to the contents of an alleged telegram purporting to grant appellees a continuation of their timber permit.

7. The court erred in allowing appellees further to amend their amended complaint after appellees had rested, since the second amended complaint was on a substantially changed cause of action.

8. The court erred in denying appellant's motions to strike portions of appellees' second amended complaint and make more definite and certain, and to strike portions of appellees' reply, since improper allegations highly prejudicial to appellant were permitted to go to the jury by virtue of the court's denying these motions.

STATEMENT.

In March of 1948, Bruno Agostino, one of the appellees, was staying at a logging camp located at Barry Arm of Prince William Sound to the west of a stream known as Mosquito Creek in the Chugach National Forest, title to which was in the United States

of America under supervision of the Department of Agriculture Forest Service. Appellees had had two timber cutting permits granted to them by the United States Forest Service, each authorizing the cutting of 500,000 board feet in the vicinity of Barry Arm. Logging under the first was completed; and the second permit had expired as of December 31, 1947, although all of the authorized timber had not been felled.

The United States Forest Service had advertised a much larger timber contract for sale, covering timber on the east side of Mosquito Creek as well as timber on the west side of the creek beyond the area covered in appellees' permits. The appellant was successful in bidding on this contract and was awarded the right to cut timber in this area.

Appellant entered into a written contract (Tr. 249-252) with Kenneth Lambert to cut timber under appellant's permit. Lambert was to hire his own men and to be in complete control of the operation, paying all expenses thereof, and was to be paid $21.00 per thousand board feet of logs rafted. During the month of March, 1948, Lambert was paid a salary by appellant while he was engaged in setting up the logging camp. After March 31st he worked in accordance with the provisions of the above mentioned contract.

During the latter part of March, Lambert approached the mouth of Mosquito Creek from a tidal inlet with the purpose of landing a floating lumber camp in a natural tidal pond at the outlet of the creek and starting operations under his contract. The appellee, Agostino, however, appeared and objected to

Lambert's grounding his camp vessels on the shore of the pond. Agostino claimed to own the pond and shore-lands. After some discussion, Agostino offered to sell his camp to the appellant, mentioning a price of $25,-000.00. Lambert and Rowell, the latter being superintendent of appellant's lumber mill located at Whittier, Alaska, also on Prince William Sound, then telephoned Thomas A. Morgan, the president of the appellant corporation, by long distance. Mr. Morgan told them to go ahead with their operations and to explain to Mr. Agostino that they had the right to go into that area under their contract with the United States Forest Service. Mr. Agostino still objected to Lambert's bringing in the camp, and again Mr. Morgan was telephoned by Lambert and Rowell. Morgan told them he would be at Barry Arm around April 10th and that he would see Mr. Agostino at that time. There also was testimony to the effect that a telegram was sent to Lambert and Rowell by Mr. Morgan. The telegram was not introduced into evidence but the testimony was to the effect that the message stated that Mr. Morgan would be at Barry Arm on about April 10th to discuss the matter with Mr. Agostino, or according to other testimony, "to settle with Mr. Agostino" (Tr. 225, 254, 371, 528).

Upon being shown this message Mr. Agostino told Lambert he could take "possession". Lambert proceeded to land the floating camp to the east of Mosquito Creek in the tideland pond. After a few days the camp was moved up Mosquito Creek and shortly thereafter logging operations were commenced.

On the basis of these facts, appellees claimed in their amended complaint that on or about March 24, 1948, an oral agreement had been entered into between appellees and appellant whereby appellant purchased appellees' camp and equipment at Barry Arm for the price of $25,000.00.

On or about April 10, 1948, Mr. Morgan came to Barry Arm and had a conversation with Mr. Agostino in the presence of Mr. Lambert and Mr. Rowell. Mr. Agostino at that time offered to sell the property for either the price of $25,000.00 or $19,000.00, the testimony being in dispute on that point. Mr. Morgan stated that the appellant company would not be interested at that price, and offered to lease appellees' property and equipment, but this was not acceptable to Mr. Agostino. All witnesses concurred in stating that no agreement was reached at that time. During the negotiations Mr. Lambert, at the request of Mr. Morgan, made in the presence of Mr. Agostino, attempted to start appellees' two tractors in order to appraise their value.

Mr. Agostino testified that Mr. Morgan stated he would return in two days, but the testimony of all other witnesses to the conversation including appellees' witness Lambert, indicate that no such statement was made. Mr. Agostino stayed at the property for about three weeks and then went to Anchorage. About the end of May, he returned to Barry Arm with his attorney, Mr. Butcher, in order to investigate the possibility of a trespass action against the appellant (Tr. 455). They found all of appellees' equipment remained

in the same place and condition as it had been prior to Lambert's coming and that none of appellant's or Lambert's employees were using any of appellees' property.

Thereafter, at Mr. Butcher's request, Mr. Morgan came to Anchorage in June to discuss a possible sale of the property with Mr. Agostino. After some discussion an agreement was entered into whereby the appellant agreed to purchase all of appellees' property at Barry Arm for the sum of $10,000.00 (Tr. 462). Mr. Butcher, appellees' attorney, reduced the contract to writing. The contract, which expressly stated that it embodied all agreements between the parties, was signed by Mr. Agostino and sent by letter dated July 2, to Mr. Morgan, who was then in Juneau. The written contract did not contain a list of the property to be conveyed, and Mr. Morgan returned to Anchorage to settle this minor detail, only to find that Mr. Butcher was out of town.

He thereupon wrote checks to take care of the various payments under the contract, left them with his agent in Anchorage, and on July 19, wrote Mr. Butcher a letter stating that the agreement was acceptable provided that a list of the property and equipment was furnished.

About this same time Mr. Lambert's contract was terminated. The appellant took over the operation at Barry Arm, and Mr. Morgan sent instructions that the appellees' property had been purchased and that the two tractors should be repaired so that they could be

used in the logging operation. It was after these instructions that, for the first time, the tractors were taken by appellant's employees and that one of appellant's employees and his wife stayed at appellees' bunk house. Prior to that time Mr. Morgan had given instructions that appellees' property was not to be touched (Tr. 533, 598).

Mr. Agostino conferred with his attorney, Mr. Butcher, upon the latter's return in August. At that time he refused to furnish a list of the property as requested by appellant, insisted on retaining one small log cabin as his own and then revoked the contract (Tr. 196).

About the end of August, Mr. Morgan, through his attorney Mr. McCarrey, was informed that Mr. Agostino had revoked the contract, whereupon Mr. Morgan ordered the appellees' equipment to be returned, and appellant's employees to leave appellees' property alone. Appellees' equipment was returned, but subsequently the Ellamar Packing Company took one of the tractors, claiming it under a conditional sales contract, and one Ray Grasser, a former partner of appellees, apparently took the other tractor and a donkey engine. Suits are now pending in the District Court at Anchorage between appellees and Mr. Grasser, and between appellees and the Ellamar Packing Company, Inc. (Tr. 481, 485).

At the conclusion of appellees' direct case, appellant moved for a directed verdict and for a nonsuit. The honorable court conceded that the allegations of

the amended complaint had not been maintained, but authorized the appellees further to amend their complaint so as to state a cause of action based on a *quantum valebant* theory. The complaint was thereafter amended to allege that on or about March 24, 1948, the appellees sold to the appellant all of their property at Barry Arm and that appellant took possession of all of the property and became indebted to pay the reasonable value therefor. Over appellant's objection, the trial was continued on this new theory, resulting in the verdict from which this appeal has been taken.

ARGUMENT.

I.

THERE WAS NO EVIDENCE TO SUPPORT THE VERDICT OF THE JURY, WHICH VERDICT WAS MANIFESTLY AGAINST THE EVIDENCE AND WAS THE RESULT OF PASSION, PREJUDICE, SYMPATHY OR MISTAKE.

In order for the appellees to prove their case it was necessary that they prove a sale of their Barry Arm camp and equipment to, and a taking possession thereof by, the appellant on or about March 24, 1948. An effort has been made in this brief to state the facts in some detail in order to indicate the exact nature of the evidence relied upon. These facts indicate that towards the end of March, 1948, the appellee, Bruno Agostino, offered to sell his buildings and equipment at Barry Arm to the appellant. This offer was made to Mr. Rowell, an employee of the appellant, and to Mr. Lambert, an independent con-

tractor who was, during the month of March only, an employee of appellant engaged in setting up a logging camp from which he was to work as independent contractor. Neither of these men had authority to make any substantial purchase on behalf of the appellant and their only authority in regard to making such a purchase as the one in question was to deliver messages to and from the president of the appellant company.

It appears that Mr. Agostino's offer was conveyed to Mr. Morgan, the president of appellant company. All the evidence of the case is clear, however, that Mr. Morgan never accepted the offer. He sent word that he would come to see Mr. Agostino. and according to one of appellees' witnesses, to arrange a settlement with him (Tr. 225). Upon receipt of this message, Mr. Agostino told Mr. Lambert that he could take "possession".

By no stretch of the imagination could Mr. Morgan's message that he would come up to see Mr. Agostino, or as the appellee Agostino stated, that he would come on the 10th of April and settle with Mr. Agostino (Tr. 132), constitute an acceptance of that offer. The only possible interpretation of such a message is that Mr. Morgan expressed an intention to discuss the matter with Mr. Agostino, and to attempt a settlement of the difficulty which had arisen between appellant and Mr. Lambert.

Since there was no expressed acceptance of a contract, it next is necessary to see whether an acceptance by the appellant may be spelled out by the authorized

actions of its agents. When Mr. Agostino received Mr. Morgan's message he told Mr. Lambert to take "possession". Lambert, whose contract with the appellant had been terminated in the middle of the 1948 logging season (Tr. 229) appeared as a witness for the appellees. It is significant that neither he nor Mr. Rowell testified that he had been authorized by Mr. Morgan to effect the purchase of the property in question, nor does Mr. Agostino in his testimony state that he was ever so informed. Thus, although no action was taken by Mr. Lambert which might be implied as an acceptance of the offer of purchase, even if there had been such action taken it would not be binding on the appellant as it would not be within either the actual or apparent scope of authority of Mr. Lambert. There was nothing in his position either impliedly or otherwise which would indicate authority to purchase anything, much less such a sizeable amount of property, for the appellant.

As stated by the honorable court below:

> "In fact, it is apparent now as a matter of law from the testimony that Lambert had only such authority as he received by telephone or telegraph from the office of the Columbia Lumber Company at Juneau in his capacity, whatever it was, working for the Columbia Lumber Company. It is clear that he had no authority to buy property—any property—and certainly no property for a very considerable sum of money." (Tr. 574, 575.)

All the testimony indicates that Lambert had no authority to purchase appellees' property or to take

possession of any of it on behalf of appellant. In fact, he was expressly instructed not to touch any of appellees' property.

Testimony of Thomas A. Morgan (Tr. 375):

"Q. Did you at that time or any time prior to that authorize any of your employees or Mr. Lambert to use any of Mr. Agostino's property or equipment?

A. As a matter of fact to the contrary I told him I would have nothing to do with it."

Mr. Rowell testified (Tr. 533):

"Q. What did Mr. Lambert—did Mr. Morgan give Mr. Lambert any instructions with regard to Mr. Agostino's property?

A. I heard him tell him not to touch anything.

* * * * * * *

Q. What was your answer to that question?

A. I heard him tell him not to use any of the equipment, not to touch any.

Q. Of Mr. Agostino's?

A. That is right."

The remaining witness to testify on this point was the appellees' witness, Lambert (Tr. 598):

"Q. Now did Tom Morgan or anyone in power at Columbia Lumber Company ever tell you that you could use Bruno's equipment there?

A. No——

Q. Did they ever tell you—pardon me.

A. I will have to retract. Mr. Morgan told me I could use that equipment. That was at the time I terminated with the Columbia Lumber Company.

Q. But prior to that time had he ever told you that?

A. No.

Q. In fact he told you just the opposite?

A. That is right."

It is to be noted that Mr. Lambert's contract was terminated on or about July 14, 1948 (Tr. 229), after a written contract had been entered into for the sale of this property for $10,000. This written contract was subsequently revoked by Mr. Agostino, and appellees did not sue on this contract. Thus, as far as the time in question was concerned, it was apparent that no one on behalf of the appellant had actual or apparent authority to take possession of appellees' property on behalf of the appellant.

Moreover, no action was taken by anyone on behalf of the appellant which could be interpreted as an implied acceptance of Mr. Agostino's offer to sell.

All that was done by Mr. Lambert was to land a floating camp in a tidewater pond. On direct examination for appellees, he testified as follows:

"Q. What equipment did you take over from Mr. Agostino and Mr. Socha?

A. I didn't take over any.

Q. Well you came on the ground and landed your equipment.

A. Yes." (Tr. 231),

and

"Q. What happened to the warehouse and other things there following your landing?

A. I never used any of that as long as I was there." (Tr. 232.)

Even the appellee, Agostino, on direct examination testified in regard to the landing of the scow by Lambert and the succeeding events as follows:

> "Q. Were they using your machinery and equipment during that time?
>
> A. No, they never used the machinery, Mr. Lambert, no.
>
> Q. He just started it up to try it out?
>
> A. Yes.
>
> Q. Now, then, did they land their house and things there then?
>
> A. I don't understand.
>
> Q. Did they land their scows there then?
>
> A. Yes.
>
> Q. What did they do during that month?
>
> A. Well, they fixed the machinery, that was all the work, waiting for the snow to go out.
>
> Q. Fixed the machinery and waited for the snow to go out?
>
> A. Yes.
>
> Q. When did they actually start cutting logs?
>
> A. Well, now, I couldn't tell you that day because after they got the machinery fixed they move in back of the pond and I came in to Anchorage. I don't know when they started to cut the timber.
>
> Q. Did they start using your bunkhouse and cookhouse?
>
> A. No, they never use my cookhouse and bunkhouse.
>
> Q. Not at that time?
>
> A. Not at that time." (Tr. 169, 170.)

Under cross-examination, Mr. Agostino admitted that the machinery which was "fixed" at that time was

Columbia Lumber's machinery and not the machinery of appellees (Tr. 191).

That Agostino, himself, did not believe that any sale had taken place, is made even clearer by the testimony of his former attorney, Mr. Butcher, who was consulted by Mr. Agostino in May. Mr. Agostino went to Mr. Butcher because "he felt that the company was trespassing on his property" (Tr. 455). He would not have taken that attitude had he thought an actual sale had transpired in March, 1948, since it would no longer have been "his property".

Moreover, in June, almost three months after the sale had allegedly occurred, an agreement of sale was entered into between Mr. Morgan and Mr. Agostino in Mr. Butcher's office. This agreement was reduced to writing by Mr. Agostino's attorney, Mr. Butcher. It expressly stated:

> "It is hereby specifically agreed that all the terms and conditions in connection with this contract have been set forth herein and that there are no other agreements, verbal or written, pertaining to this sale or the method of paying for the same on the part of purchaser."

Mr. Agostino signed this agreement and acknowledged it before a Notary Public. Regardless of whether or not this written agreement together with the letter sent in reply thereto by Mr. Morgan and appellant's actions after receiving it, constituted a binding contract, it clearly negates appellees' contention that in March a sale had taken place conveying the same property.

It is also highly significant that when Mr. Agostino and Mr. Butcher came to Barry Arm at the end of May or early in June to inspect the appellees' property, they found none of it being used or possessed by the appellant (Tr. 193, 194).

What actually transpired was stated in the concluding testimony by the appellees' witness Lambert, under cross-examination, as follows (Tr. 599):

"By Mr. Boochever. Q. Now, you spoke about a conversation of April 10th in which some mention was made of a small cabin, Mr. Lambert?

A. Yes.

Q. Was any agreement reached in regard to the sale of that property at that time?

A. No.

Mr. Boochever. That is all, Your Honor.

Further Redirect Examination

By Mr. Ross. Q. Now, that property, Mr. Lambert, when you state that do you mean just that cabin or do you mean the agreement about the whole Barry Arm campsite? (552).

A. The whole Barry Arm campsite including all material that was there, all equipment.

Further Recross-examination

By Mr. Boochever. Q. Was any sale made at that time of the Barry Arm camp?

A. No.

Q. Was any made prior to the date when you were there?

A. Not to my knowledge.

Mr. Boochever. That is all, Your Honor.

The Court. That is all, Mr. Lambert, you may step down."

It thus is apparent that not only was there no express contract for the sale of the appellees' property, but that all the testimony is to the effect that there was no implied contract. The verdict of the jury accordingly should be set aside as not supported by any legal or competent evidence and as being against the evidence. The deductions drawn from the evidence by the jury were clearly erroneous and such as a jury reasonably viewing the evidence could not properly find, and the verdict was against the law as applied to the facts found and against the admissions of appellee Agostino and appellees' witness Lambert. As a result of such verdict, substantial justice has not been done; and the verdict, having been based on passion, prejudice or mistake, should be set aside.

Work v. Kinney, 7 Idaho 460, 63 P. 596;

Calnon v. Fidelity Phenix Fire Ins. Co., 114 Neb. 53, 205 N.W. 942, modified on other grounds, 207 N.W. 528;

Phillips v. Yarter, 156 N.Y.S. 875, 172 App. Div. 912;

National Life & Accident Ins. Co. v. Langston (Civ. App.), 42 S.W. (2d) 1037;

O'Brien v. Alston, 213 P. 791, 61 Utah 368;

Crescent Mfg. Co. v. Hansen, 174 Wash. 193, 24 P. (2d) 604;

Magnolia Petroleum Co. v. Bell, 186 Ark. 723, 55 S.W. (2d) 782;

Ennis v. Milwaukee Electric Ry. & Light Co., 202 Wis. 277, 232 N.W. 540;
Platt v. Owens, 183 Ark. 261, 35 S.W. (2d) 358;
Randleman v. Boeres, 93 Cal. App. 745, 270 P. 374;
Kawczynski v. Prudential Ins. Co. of America, 279 N.Y.S. 270, 244 App. Div. 759;
Verdi v. Helper State Bank, 57 Utah 502, 196 P. 225, 15 A.L.R. 641;
Turner v. Good, 8 P. (2d) 414, 167 Wash. 27;
Mason v. Town Garage Co., 53 S.W. (2d) 409, 227 Mo. App. 297.

II.

THE HONORABLE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 5 OVER APPELLANT'S OBJECTION, SINCE THAT INSTRUCTION PERMITTED THE JURY TO CONCLUDE THAT LANDING A SCOW IN THE UNOCCUPIED PORTION OF A TIDEWATER POND IN WHICH APPELLEES HAD PLACED A FEW PILINGS, CONSTITUTED A TAKING OF POSSESSION OF APPELLEES' PROPERTY BY APPELLANT SO AS TO COMPLETE A SALE.

An essential matter of proof in appellees' case was the necessity of showing that the appellant took possession of appellees' property on or about March 24, 1948. It was undisputed that appellant landed a scow containing bunkhouses and logging equipment in a certain tidewater inlet near the mouth of Mosquito Creek. This so-called pond was, according to the appellee Agostino's testimony, approximately 400 feet wide and 20 feet deep when the tide was in (Tr. 123).

The evidence was that this tidewater pond was a natural one (see Tr. 162).

There was also evidence that appellees had placed some hand driven piles in a portion of this pond (Tr. 162). The testimony was conflicting as to the number of such pilings placed in the pond and the area covered by them (Tr. 162, 348, 154), but there was no testimony to the effect that appellant ever used any of these pilings or in any way interfered with them. Pictures showing the pilings and the general pond area were introduced into evidence by appellees (see plaintiff's Exhibits 4, 10, 12, 16, 17, 19 and 24).

There was also conflicting testimony by the appellees Agostino and Socha, as to whether any other work had been done in regard to this pond, the witness Agostino stating that no work was done on the pond other than putting in approximately 30 pilings (Tr. 162), while the witness Socha stated that a portion of the pond was cleared of stumps. In any event, there was no evidence to the effect that the appellant or Mr. Lambert landed the scow or used the portion of the tidewater pond so cleared. The only testimony on this point was by the witness E. M. Jacobson, who stated that the appellant did not use the portion of the tidewater pond previously used by Agostino and Socha (Tr. 290).

In view of the conflicting testimony in regard to the nature of this pond, and in view of the importance of the question as to whether or not the landing of a scow on an unoccupied portion of the shore of this pond would constitute a taking of possession of ap-

pellees' property, the court's instruction on this point was of paramount significance to the outcome of this case. Instruction No. 5 stated in part:

> "It should be noted that as respects tidelands, actual possession is necessary to establish superior right. Without actual possession all persons enjoy equal right to use thereof. *Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings. But exclusive uninterrupted and long continued possession and use for other purposes may give such superior right, provided there is real and actual possession.*" (Emphasis ours.)

Appellant excepted to this instruction, pointing out the instruction as given could be construed in such a manner that a few pilings in a tideland pond would give the appellees the exclusive right to the whole pond so that appellant's taking the possession of an unoccupied portion of the pond, could be interpreted by the jury to constitute an acceptance of possession of appellees' property.

Instruction No. 5 as originally given by the court provided that:

> "Plaintiffs had the lawful right to keep and maintain possession of the lands and tidelands possessed by them on and prior to March 24, 1948."

Exception was taken to this instruction for the reason that no definition was given as to what constituted possession (see Tr. 637, 638). As a result of this exception, after arguments had been made to the jury, the court added an additional paragraph to Instruc-

tion No. 5, which contained in part the provisions quoted above. Exception was duly taken to this portion of the instruction, as follows:

> "Counsel for defendant may take exceptions.
>
> Mr. Boochever. The only one is in regard to Instruction 5 on page 2 where it states 'Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings.' We think that after that there should be added 'and that the superior right established by such position (possession) extends only to such structural improvements and not to unoccupied portions of tidelands' or some such similar provision so that they will understand that a few pilings in a tideland pond does not give exclusive right to the whole pond but only to the portions occupied by the pilings." (Tr. 652.)

Although it would have required but a simple change to have clarified this instruction, the court did not see fit so to do and the obviously erroneous impression was left with the jury, by which they could construe the landing of a scow in an unoccupied portion of a sizeable tidewater pond as constituting a taking of possession of appellees' property.

The courts have long adjudicated the type of possession which is necessary to constitute a superior right to tidelands of other public lands of the United States. The paramount title to tidelands in Alaska is in the United States and the only question involved is that of possessory rights.

The case of *Juneau Ferry & Navigation Company v. Alaska Steamship Company,* 1 Alaska 533 Affirmed

121 Fed. 356, 2 Alaska Fed. 59, is somewhat similar to the one at bar. In that case the plaintiff sought to restrain the defendant from building a wharf across a portion of tidelands claimed by the plaintiff. As stated by the District Court in 1 Alaska at page 535:

> "The plaintiff claims title by occupation of a certain portion of this tidewater, having, as it says, kept a 'cradle' anchored on a part of the same, by itself and its grantors since 1899 * * * It is a matter of grave doubt whether a person can put a pile or two upon the tide flats, or any such temporary structure as the 'cradle' described by the witnesses in this case and thereby establish possession or right of possession. It is to be remembered that these tidelands are not held for sale by the government; that no one can occupy them as of right, as they can uplands, with a view of obtaining title thereto from the government when the land shall come into the market. All that go upon these tidelands are trespassers. They are there without right or authority of law. If they have possession, it must be such character of possion as keeps all others out and such as constitutes actual occupation by themselves."

This honorable court affirmed the decision of the District Court, stating:

> "The suit being one in equity, we must decide it upon the evidence; and we are of the opinion that while the evidence undoubtedly shows that the complainant and its predecessors in interest used the strip of waterfront in controversy from time to time, yet it falls far short of establishing such possession thereof on the part of the

complainant as would justify the injunction prayed for."

Similarly, in the case of *Haines Wharf Company v. Dalton,* 1 Alaska 555, the District Court for the Territory of Alaska stated:

"* * * The occupation by the Daltons of other portions of the tract having no boundaries fixed therefor, would give them no right of possession whatsoever over lands wholly unoccupied. Legally speaking as he had no boundaries to his southern line bordering on the street at the water line * * * he had no possession or right of possession of any of the lands south of the ground actually occupied by him, viz., by the Dalton building."

This honorable court gave its interpretation of the terms "occupancy" and "possession" in the case of *Gordon v. Ross-Higgins Co.,* 162 Fed. 637, by quoting from the case of *Fleming v. Maddox,* 30 Iowa 240, as to the meaning of "occupancy" as follows:

"It follows from these authorities that there can be no such thing as constructive occupancy under the townsite laws, but there must be an actual bodily presence of the claimant, or some one for him on the lot or lots for which he seeks to acquire title, or a purpose to enjoy united with or manifested by such visible acts, improvements, or inclosures as will give to the claimant the absolute and exclusive enjoyment of it."

and, as to the meaning of the term "possession", by quoting from the case of *Courtney v. Turner,* 12 Nev. 345 at 352, as follows:

> "'Actual Possession' of land consists of subjecting it to the will and dominion of the occupant, and must be evidenced by those things which are essential to its beneficial use. Justice to the community also requires in the circumstances of this country that the extent of the claim should be clearly defined and that the possession should be open, notorious and continuous."

The case of *Crawford v. Burr,* 2 Alaska 33, involved analogous circumstances. The plaintiff had erected a stable on a subsequently abandoned military reservation and claimed the surrounding land. He brought a suit for ejectment, but the District Court held, on pages 37 and 38:

> "Whatever fencing Crawford may have had in 1900, there is no claim or pretense that he had any such, or any other boundary around the tract on July 25, 1902. Upon that date his small log stable, overgrown with brush, yet stood where he erected it in 1900, and constituted his only sign of possession. He then made no attempt to locate his boundaries definitely by stakes, monuments, fences or otherwise, and the defendants located on that tract without any knowledge of the extent of his claim other than as shown by the stable. Under this condition of the evidence, the land being unsurveyed, he must be limited to the land actually occupied by the stable." See also *Hinchman v. Ripinsky,* 3 Alaska 557; *State v. Central P. Railway Co.* (Sup. Ct. of Nev.), 30 P. 686 at 688; *Price v. Brockway,* 1 Alaska 235.

In the case at bar, the instruction of the honorable court stating that actual possession is manifested by

pilings, without explaining that a few pilings in a large pond would not, in and of itself, give a superior right to the unoccupied portions of the pond, in effect amounted to instructing the jury to find that appellant had taken possession of appellees' property by landing a scow in the unoccupied portions of this pond. This instruction, under the circumstances of this case, was clearly erroneous and may well have been the reason that the jury reached its incorrect verdict in this case.

Moreover, Instruction 5 in regard to the possession of public lands, made no reference to the paramount title of the United States and to those claiming a right under the United States. The instruction was specifically excepted to for that reason (see Tr. 638 and 639).

There had been testimony to the effect that appellees' permit to cut timber had expired as of December 31, 1947, and that it had not been reinstated until July of 1948, after the alleged sale had taken place (Tr. 311). There was also testimony to the effect that appellant had, in the month of February or March, secured a contract from the United States Forest Service to log timber in this area (Tr. 281, 282). The jury, in deciding whether appellant was taking possession of appellees' property by landing a scow and going into this area, should have been instructed as to the paramount rights of the United States and those claiming under it. Appellant's requested Instructions Nos. 20 and 26 were given to the court within the time prescribed by the court rules

and appellant took timely exception to the court's instruction as mentioned above. In omitting reference to the rights of those claiming under the United States, it is respectfully submitted that the honorable court erred and that such error was highly prejudicial to the appellant.

III.

THE DISTRICT COURT ERRED BY REFUSING TO INSTRUCT THE JURY THAT KENNETH LAMBERT WAS AN INDEPENDENT CONTRACTOR AT ALL TIMES AFTER APRIL 1, 1948 SINCE ALL THE ORAL EVIDENCE AND THE WRITTEN CONTRACT EXECUTED BETWEEN THE APPELLANT AND LAMBERT COULD ONLY BE CONSTRUED AS ESTABLISHING AN INDEPENDENT CONTRACT RELATIONSHIP.

Mr. Lambert entered into written contract with the appellant on February 16, 1948, whereby he agreed to produce logs for appellant for a price of $21.00 per M. (Tr. 249-252, Defendant's Exhibit "D"). He appeared as a witness for the appellees and on cross examination testified as to his functions under this contract as follows:

> "Q. (By Mr. Boochever). Now, Mr. Lambert, in conformity with that contract you hired your own men, did you, to go up there and log for you?
>
> A. Yes.
>
> Q. And you were the boss of those men and in charge of them and could fire them and tell them what to do, is that right?
>
> A. Oh, yes.

Q. No one came in and said you do this, that or the other thing with regard to the details of the work?

A. No." (Tr. 252.)

There was testimony to the effect that during the month of March, 1948, Mr. Lambert received wages from the appellant while Lambert was engaged in moving the floating camp and A-frame from Hobo Bay to Barry Arm. The period of time that he received such wages terminated on March 31, 1948. (Tr. 260.) After that time, he was on his "own as a contractor." (Tr. 263.)

Regardless of whether or not Mr. Lambert might have been regarded as an independent contractor during the month of March, when he received wages from the appellant, all the evidence indicates that he was an independent contractor rather than a servant of appellant on and after April 1, 1948.

Edward F. McAllister testified as follows:

"Q. Where were you in the spring of 1948?

A. I came to Barry Arm Camp on the 15th of April.

Q. How did you happen to come there?

A. I hired out to Blacky Lambert of Seattle. (Blacky Lambert was the nickname of Kenneth B. Lambert).

Q. And did Mr. Lambert hire you?

A. That is right." (Tr. 343.)

Thomas A. Morgan, president of appellant company, testified as to the company's method of securing logs, as follows:

"Q. How do you usually operate in regard to getting timber cut?

A. Our policy for many years has been to contract with independent loggers—men to whom we will give a contract to produce a specified quantity of timber each year, anywhere from perhaps a million feet to perhaps 10,000,000 feet.

Q. Do you have any control over the manner in which those men operate with regard to how they handle their employees and the detail of their business?

A. We do not. We give each one a contract which is properly set up to give them full jurisdiction and they are in fact an independent contractor—hire the men, fire them, and provide the usual supervision as an independent contractor." (Tr. 365, 366.)

Although a number of factors are of importance in determining whether a relationship is that of master and servant or contractee and independent contractor, the principal test is the right to control the mode of doing the work (56 C.J.S. 49). Other considerations are the control over the employee's servants and the mode of payment. In all of these regards, the evidence in the subject case is not conflicting but leads to the inescapable conclusion that Lambert was an independent contractor at all times after April 1, 1948.

Since it was imperative that appellees prove a taking of possession by appellant, the actions of Mr. Lambert while in the vicinity of Barry Arm were of considerable importance. As the acts of an independent

contractor, these actions were not binding on appellant unless expressly or impliedly authorized.

Mr. Lambert, during the period of time after April 1, used some gasoline and oil which he stated that he "borrowed" from appellees (Tr. 595), and cut some timber which appellees claim belonged to them. This was done without any authority from the appellant.

> "Q. And the borrowing of those barrels of oil was done on your own, isn't that right?
>
> A. Yes.
>
> Q. Entirely so?
>
> A. Yes." (Tr. 598.)

A requested instruction, Defendant's Requested Instruction No. XIV, (and also Defendant's Requested Instruction No. XXIV), accurately stating the law in regard to the fact that Mr. Lambert was an independent contractor, was filed with the Court in accordance with the Rules of Court. Timely exception was taken to the court's failure to instruct the jury on this important matter, as follows:

> "Your Honor, requested instruction of the Defendant No. 14 has to do with independent contractors, and Kenneth Lambert, as previously mentioned we feel that we are entitled as a matter of law to an instruction that Lambert was an independent contractor. We also feel that we are entitled to an instruction of the court that Lambert's employment was such prior to the time that he started as an independent contractor that he wasn't entitled to bind the defendant on any sale or attempted sale or purchase or anything of that nature. We feel that the evidence is un-

> disputed in that respect and that it is improper to let that matter go to the jury without an instruction on it." (Tr. 643, 644.)

Instead of giving appellant's requested instruction, the Honorable Court erroneously left it up to the jury to decide whether or not Mr. Lambert was an independent contractor from and after April 2, 1948. (See Instruction 6-D, Tr. 88 and 89.)

After objection by appellant, the court did add a definition of an independent contractor. The instruction, as given, however, was objected to by counsel for appellant, pointing out that under the circumstances of this case, Mr. Lambert's status as an independent contractor involved a question of law and was not a proper one for the jury (Tr. 632). The written evidence, as well as all the oral testimony, indicated that Lambert was in complete control of the details of the logging operation, that he hired and fired his own men, that he was under no control by appellant except as to the end results of the performance of his contract. There was no testimony in conflict with this evidence, and manifestly the court should have instructed the jury as to Mr. Lambert's status, rather than leaving it as a matter for conjecture.

The law is well settled that:

> "The existence of such relation ordinarily is a question of law for the court where its determination depends on a written contract which is definite and unambiguous in its terms, and such is the case where the facts are clear and undisputed, although the contract rests in parol.

> * * * Where the contract of employment is in writing and oral evidence is introduced with reference to the practice under it, and but one inference can be drawn from the evidence, the question whether an employer and independent contractor relationship exists is for the court." (57 C.J.S. 416, 417.)

Thus in the case of *De Board v. Procter & Gamble Distributing Co.*, 58 F. Sup. 157, Affirmed 146 F. (2d) 54, where the defendant contracted with a transit company to move defendant's truck from Georgia to Ohio, even though there was no written contract as in the subject case, a directed verdict for the defendant was sustained since the driver of the truck was selected, instructed and paid by the transit company. The Fifth Circuit Court of Appeals, in rendering its decision, stated:

> "The testimony of the witnesses as to who was in charge and control of the truck at the time of the accident, as to how he got control of it, and as to whose employee he was, is without dispute, and no fact or circumstance in evidence in any way impeaches that testimony. The district judge was right then in holding that the evidence showed as matter of law that there was an independent contract and that the injury occurred in the course of its carrying out by the contractor." (146 F. 2d at 56 and 57.)

Similarly, in the case of *Horan v. Richfield Oil Corporation,* Sup. Ct. of Arizona, 105 P. (2d) 514, 56 Ariz. 64, it was held that the issue involved a question of law rather than one for the jury. In that

case, the plaintiff was hurt at a gasoline station leased by the defendant. The defendant had subleased to one Estes under a written agreement whereby Estes was to operate the station. Dissatisfied with Estes' operation of the station, defendant replaced him with one Combs, who had "taken over" at the time of the injury, although he had entered into no written contract. The court held:

> "We are of the opinion that there is no evidence in the record sufficient to go to a jury on the question of whether defendant was in possession of its station through a hired employee and that the only reasonable construction which can be based on the evidence offered is that Combs was in possession as an independent operator in the same general manner as Estes before."

The case of *Harger v. Harger,* 222 S.W. 736, Sup. Ct. of Arkansas, involved a suit against a coal mine owner who had leased the mine under an agreement whereby the lessee was to sell the entire output to the owner at a stipulated price. The court held that as a matter of law, the defendant owner of the coal mine was not the employer of the one operating it and that it was error for the court below to submit the question to the jury. Similarly in the case at bar, it was error of the District Court to submit to the jury the question of whether Lambert was an independent contractor after April 1, 1948.

A case quite similar to the one at bar was that of *Wallace v. Pine Tree Mfg. Co.,* 185 N.W. 500, 150 Minn. 386. The defendant had entered into a contract

with Connors & Wilson to log timber of defendant's and to raft it and ship it to defendant's mill. Connors & Wilson were to be paid $11.00 per thousand feet upon delivery. The defendant was permitted to have men in Connors & Wilson's camp for the purpose of supervising the defendant's interest in the contract. The plaintiff was involved in shipping logs down the same river used by Connors & Wilson and sued the defendant on the grounds that plaintiff's rights to use the river were interfered with by the transportation of defendant's rafts. The Supreme Court of Minnesota held that Connors & Wilson were independent contractors, stating:

> "Construing the contract itself in the light of the surrounding circumstances most favorable to the plaintiff, neither court nor jury is warranted in reaching any other conclusion than that Connors & Wilson, in the driving of defendant's logs, were independent contractors." (See also *Green v. Soule* (Supreme Court of Calif.) 78 Pac. 337, wherein it was held that the question as to whether a plastering contractor was an independent contractor was for the Court, and that in that case he was an independent contractor even though he was under the supervision of an architect).

The general rule of law is stated in 65 L.R.A. 508 as follows:

> "If the contract of employment has been reduced to writing, the question of whether the person employed was an independent contractor or merely a servant is determined by the court."

Among the numerous other cases upholding this proposition of law are the following:

Ryan v. Associates Inv. Co. of Illinois, 18 N.E. (2d) 47, 297 Ill. App. 544;

Giroud v. Stryker Transp. Co., 140 A. 305, 104 N.J. Law 424;

Hawk Ice Cream Co. v. Rush, 180 P. (2d) 154, 198 Okla. 544;

World Pub. Co. v. Smith, 161 P. (2d) 861, 195 Okla. 691;

Marion Machine, Foundry & Supply Co. v. Duncan, 101 P. (2d) 813, 187 Okla. 160;

Blackwell Cheese Co. v. Pedigo, 96 P. (2d) 1043, 186 Okla. 159;

McGrath v. Edward G. Budd Mfg. Co., 36 A. (2d) 303, 348 Pa. 619;

Bojarski v. M. F. Howlett, Inc., 140 A. 544, 291 Pa. 485;

Taylor v. Haynes, Civ. App., 19 S.W. (2d) 850, reversed on other grounds, 35 S.W. (2d) 104;

Batt v. San Diego Sun Pub. Co., 69 Pac. (2d) 216, 21 Cal. App. (2d) 429;

Thayer v. Kerchlof, 266 P. 225, 83 Colo. 480;

Ruth Bros. v. Stambaugh's Adm'r, 122 S.W. (2d) 501, 275 Ky. 677;

City of Muskogee v. McMurry, 8 P. (2d) 670, 155 Okla. 203.

In view of the fact that the written contract indicated that Lambert was in complete charge of the operation of producing logs, that he hired and fired

the employees used in the work, that he was paid according to the results obtained, that he paid the expenses of the operation himself, and in view of the uncontradicted testimony that he was in complete control of the details of the operation, as a matter of law, he was an independent contractor after April 1, 1948 while at Barry Arm; and the court erred in leaving the question to the jury.

IV.

THE ALLEGED ORAL CONTRACT OF SALE OF MARCH 24, 1948, WAS NOT ENFORCEABLE AS FALLING WITHIN THE PROVISIONS OF THE STATUTE OF FRAUDS, ACLA 1949, SECTION 29-1-12, SINCE THERE WAS NO SUCH ACCEPTANCE OR RECEIPT AS TO TAKE THE CONTRACT OUT OF THE STATUTE; AND THE COURT'S INSTRUCTION NO. 4 WAS ERRONEOUS IN STATING UNDER THE CIRCUMSTANCES OF THIS CASE THAT "AN ORAL CONTRACT FOR THE SALE OF PERSONAL PROPERTY MAY IN LAW, IF PROVED, BE JUST AS VALID AND ENFORCEABLE AS THOUGH IT WERE WRITTEN".

It was undisputed that the oral contract of sale alleged by the appellees in their amended complaint and in their second amended complaint was for goods of a value in excess of $500.00. Accordingly, this alleged oral contract came under the provisions of Section 29-1-12, A.C.L.A., 1949, which reads in part as follows:

> "Statute of frauds.
>
> (1) (Requirement of writing, etc.) A contract to sell or a sale of any goods or choses in

> action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

Despite this undisputed fact, the court in its Instruction No. 4, stated:

> "Contracts for sale and purchase of personal property are sometimes put in writing, but not always. An oral contract for the sale of personal property may in law, if proved, be just as valid and enforceable as though it were written."

Where, as in the subject case, the only oral contract involved was for the alleged sale of goods and choses of action in excess of $500.00 value, the instruction, without mentioning at that point the requirement of acceptance and receipt, was directly contrary to the statute and apt to be extremely misleading to the jury. This fact was pointed out to the court by appellant's exception to this instruction (Tr. 635). The fact that the court in Instruction No. 6 referred to the requirements of the statute, did not cure the possible effects of the erroneous portion of Instruction No. 4, as was expressly pointed out in appellant's exception to this instruction. It would have been a simple matter to have added to Instruction No. 4 a provision covering the requirements of the

statute, so as to prevent that instruction from being in conflict with Instruction No. 6, and so as to prevent the possibility of the jury being misled in that connection; and the court's failure so to amend that instruction was prejudicial to appellant's case.

Moreover, there was no evidence of a receipt and acceptance of part of the goods allegedly sold, so as to take the alleged oral contract outside the provisions of the statute. As mentioned in Section I of this brief (supra), Kenneth Lambert had neither express nor implied authority from the appellant company to enter into a contract for the purchase of appellees' property. The honorable court below admitted that there was no such implied authority (Tr. 574, 575). While Lambert had orders to cut timber under appellant's timber contract, he was expressly instructed not to "touch" any of appellees' property. (See Section I, supra, and Tr. 375, 533 and 598.)

While "A buyer may accept the goods by an authorized agent, the power of the agent to bind the principal depends on the law of agency". *Williston on Sales,* Rev. Ed. Vol. 1, p. 212.

In the subject case, Lambert had neither express nor implied authority to make such a purchase as the one alleged; and there is no showing at all that anyone else acted on behalf of appellant in receiving or accepting part of the property allegedly sold.

The only actions established which could by any means be regarded as a receipt and acceptance of part of the goods allegedly sold, were those of Lam-

bert in landing a scow in the unoccupied portions of a tideland pond, and in cutting timber under the provisions of the appellant's contract with the United States Forest Service. Neither of these actions could constitute a receipt and acceptance so as to take this case out of the statute of frauds, and for this as well as other reasons, the court below should have granted appellant's motions for directed verdict, non-suit, judgment not withstanding the verdict, and new trial.

The law in regard to the requirements for an acceptance and receipt so as to take an oral contract of sale out of the Statute of Frauds has been authoritatively set forth by the Supreme Court of the United States in the case of *Hinchman v. Lincoln,* 124 U.S. 38, at pages 48 to 50, 31 Law. Ed. 337. In that case Lincoln claimed that Hinchman orally agreed to buy stocks from him for $18,000.00. The stocks were to be delivered to Mr. Van Rensselaer for Hinchman. Defendant appealed from a verdict for the plaintiff. The Supreme Court held that there was sufficient evidence of an oral contract of sale (the facts were much stronger for the plaintiff in that connection than in the case at bar), but as a matter of law there was no such acceptance of the property as to take the case out of the Statute of Frauds.

> "In dealing with the question arising on this record we keep in view the general rule that it is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do amount to a receipt and acceptance

within the terms of the Staute of Frauds. Bushel v. Wheeler, 15 Q.B. 442; Morton v. Tibbett, 15 Q.B. 428; Borrowscale v. Bosworth, 99 Mass. 381; Wartman v. Breed, 117 Mass. 18. But where the facts in relation to a contract of sale alleged to be within the Statute of Frauds are not in dispute, it belongs to the court to determine their legal effect. Shepherd v. Pressey, 32 N.H. 56. And so it is for the court to withhold the facts from the jury when they are not such as can in law warrant finding an acceptance, and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence. Browne, Stat. Frauds, Sec. 321; Denny v. Williams, 5 Allen, 5; Howard v. Borden, 13 Allen, 299; Pinkham v. Mattox, 53 N.H. 604.

In order to take the contract out of the operation of the statute, it was said by the New York Court of Appeals in Marsh v. Rouse, 44 N.Y. 643, that there must be 'acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer as absolute owner, discharged of all lien for the price.' This is adopted in the text of Benjamin on Sales, Sec. 179, Bennett's 4th Am. ed., as the language of the decisions in America. In Shindler v. Houston, 1 N.Y. 261, 49 Am. Dec. 316, Gardner, J., adopts the language of the court in Phillips v. Bistoli, 2 Barn. & C. 511, 'That to satisfy the statute there must be a delivery by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter

with the intent of taking possession as owner.' And adds: 'This, I apprehend, is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient. Bailey v. Ogden, 3 Johns, 421, 3 Am. Dec. 509. * * * In a word, the statute of fraudulent conveyances and contracts pronounces these agreements, when made, void, unless the buyer should 'accept and receive some part of the goods.' The language is unequivocal, and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance.' In the same case Wright, J., said: 'The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit. * * * Where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inferences to be drawn from them, and hold the contract to be within the statute. * * * I think I may affirm with safety that the doctrine is now clearly settled that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer, and that this delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract.'

This case is regarded as a leading authority on the subject in the State of New York, and

has been uniformly followed there, and is recognized and supported by the decisions of the highest courts in many other States, as will appear from the note to the case as reported in 49 Am. Dec. 316, where a large number of them are collected. So in Remick v. Sandford, 120 Mass. 309, 316, it was said by Devens, J., speaking of the distinction between an acceptance which would satisfy the statute and an acceptance which would show that the goods corresponded with the warranty of the contract, that 'If the buyer accepts the goods as those which he purchased, he may afterwards reject them if they were not what they were warranted to be, but the statute is satisfied. But while such an acceptance satisfies the statute, in order to have that effect it must be by some unequivocal act done on the part of the buyer with intent to take possession of the goods as owner. The sale must be perfected, and this is to be shown, not by proof of a change of possession only, but of such change with such intent. When it is thus definitely established that the relation of vendor and vendee exists, written evidence of the contract is dispensed with, although the buyer, when the sale is with warranty, may still retain his right to reject the goods if they do not correspond with the warranty. That there has been an acceptance of this character, or that the buyer has conducted himself, in regard to the goods, as owner is to be proved by the party setting up the contract.' " (124 U.S. 38, pp. 48 to 50.)

There was no "unequivocal act" by the appellant or any authorized agent of appellant which could be

construed as such a taking of possession of part of appellees' property as to evidence an intent to become owner thereof, except under the written contract of July, 1948 (appellees did not sue on this contract, and appellee Agostino revoked it). Moreover, appellees did not give up their lien on the property. Thus at the end of June, 1948, the appellee Agostino signed a written contract providing for the transfer of possession of the property to appellant upon the execution of that written agreement (Tr. 34, 199). In July appellees applied in their own names for an extension of the right to cut timber (Tr. 181, 182), although under the alleged oral contract of sale that timber was supposed to have been sold to the appellant the previous March 24th, and as late as May 11, 1949, appellees filed a complaint against the Ellamar Packing Company, claiming ownership in themselves of one of the two caterpillar tractors supposedly sold to the appellant in March, 1948 (Tr. 483, 484).

As this honorable court quoted in its decision in the case of *Kratzer v. Day,* 12 Fed. (2d) 724 at 727,

> "Ordinarily the accepetance and receipt must be such a transfer of the property as places the goods beyond the control of the seller and within the control of the buyer."

There was no such acceptance and receipt on the part of the appellant or any authorized agent of appellant, and it is respectfully submitted that the court should have ruled as a matter of law that the alleged

oral contract was unenforceable under the provisions of Section 29-1-12, A.C.L.A., 1949.

Hinchman v. Lincoln, supra;
Kratzer v. Day, supra;
Richardson v. Smith, 101 Md. 15, 60 A. 612;
Johnson v. Bybee, 16 S.W. (2d) 602 (Mo. Appeals);
Wright v. Schran, 121 Neb. 775, 238 N.W. 658;
Stopfel v. Tearney, 207 N.Y. App. Div. 18, 201 N.Y.S. 621;
Goldbrother Manufacturing Co. v. Hammond Olsen Lumber Co., 184 Wis. 221, 199 N.W. 147.

V.

ON OR ABOUT JUNE 29, 1948, THE PARTIES HERETO ENTERED INTO AN AGREEMENT FOR THE SALE OF THE PROPERTY IN QUESTION. SINCE THIS AGREEMENT WAS REDUCED TO WRITING, SIGNED BY APPELLEES, AND SINCE APPELLANT TOOK POSSESSION OF THE PROPERTY UNDER THE TERMS OF THIS AGREEMENT, THE COURT ERRED IN PERMITTING EVIDENCE TO BE INTRODUCED OF AN ALLEGED PRIOR INCONSISTENT ORAL AGREEMENT INVOLVING THE SAME TRANSACTION.

In June, 1948, the appellee Agostino and Thomas Morgan, president of appellant company, reached an agreement of sale concerning the property which was the subject of this suit (Tr. 462). This agreement was reduced to writing by appellees' attorney, Mr. Butcher and the appellee Agostino signed this written agreement and acknowledged it before a Notary Public. The agreement provided in part:

> "It is hereby specifically agreed that all the terms and conditions in connection with this contract have been set forth herein and that there are no other agreements, verbal or written, pertaining to this sale or the method of paying for the same on the part of purchaser." (Tr. 199, 200.)

The agreement provided for an initial payment of $3300.00 to be made "through Harold J. Butcher, Attorney for the seller", to be deposited with the Clerk of Court and held in escrow pending the outcome of a dispute between appellees and one Ray Grasser concerning the title to part of the property involved in this suit (Tr. 198). Mr. Morgan was in Juneau, when, on about July 5, 1948, he received a letter from Mr. Butcher transmitting this written agreement which had been signed and acknowledged by appellee Agostino. On about July 9th he proceeded to Anchorage and called on Mr. Butcher to complete the contract, and to secure a list of the property to be conveyed (Tr. 383). Mr. Butcher, however, had left the Territory of Alaska to attend a convention and could not be reached at that time. Mr. Morgan proceeded on the assumption that the contract was completed. For the first time he gave instructions to use appellees' property at Barry Arm; he wrote the checks as required under the contract (Tr. 384, 498, 499, 453), and he wrote to Mr. Butcher explaining that the contract was acceptable and that the checks would be paid in accordance with its provisions as soon as a list of the property was fur-

nished (Tr. 385). In reliance on this contract appellant proceeded to repair the two caterpillar tractors which were part of the property conveyed under the agreement (Tr. 389, 543).

Appellant objected to testimony of the alleged prior oral agreement which was in conflict with the provisions of this written agreement. That the written contract signed by Mr. Agostino and acted upon by appellant constituted a binding agreement until revoked by appellees (Tr. 196), is clear. Even assuming that the written contract signed by the appellee Agostino and the letter of July 19, 1948, signed by the president of appellant did not constitute a binding agreement, at the very least the written agreement forwarded to Mr. Morgan constituted an offer to enter into a contract; and the offer was accepted when appellant took possession of appellees' property under the terms thereof.

> "With certain exceptions parol or extrinsic evidence is not admissible to vary the terms of a written contract for prior or contemporaneous negotiations are regarded as merged therein." (32 C.J.S. 816.)

> "It is of course necessary to the application of the parol evidence rule to contracts that there shall be a complete written contract between the parties, as appears infra Sec. 1013; but it is not necessary that the contract be in any particular form, or that it all be contained in one paper, or signed by both parties; and a writing evidencing the whole of an agreement between the parties which has been delivered, accepted, and

under which business has been transacted, cannot be varied by parol, even though it is not signed; nor does the fact that a contract originally rested in parol and was reduced to writing only after being partly performed preclude the application to the writing of the rule excluding parol evidence to vary or contradict the writing, for the parol agreement is merged in the written one." (32 C.J.S. 823, 824.)

Thus it was held in the case of *Manufacturers and Merchants Inspection Bureau v. Everwear Hosiery Co.,* 152 Wis. 73, 138 N.W. 624, that acceptance of a proposed contract contained in a letter, by acting under it for a period of time, is sufficient, without formal signing of it, to exclude parol evidence of its terms.

The Minnesota Supreme Court stated in the case of *Horn v. Hansen,* 56 Minn. 43, 57 N.W. 315, 22 L.R.A. 617 at 619:

> "But the written proposal or promise could not be contradicted by parol, though it might be shown that it was or was not accepted, or that the stipulated quantity of wheat was or was not in fact appropriated to the agreement. The general rule is that the omitted portions of contract which does not appear to be complete may be proved by parol, but so much of the contract as is in writing must be proved by the writing." (*Thomas v. Scutt,* 127 N.Y. 138.)

In the case of *Lamson Consolidated Stock Service Company v. Harting,* 19 N.Y.S. 233, 234, and 235, the court states the law to be as follows:

"Purporting to be a conditional sale of chattels, the paper in question specifies the conditions, names the sellers and buyers, identifies the thing sold, states the price, times of payment, and place of delivery. In this enumeration, what element to the completeness of such a contract is wanting? True, the paper is signed only by the defendant, the buyer: but the acceptance of it and delivery of the chattels, pursuant to its provisions, makes plaintiff the seller as essentially a party to it as would be implied by an informal subscription.

* * * * * * *

"In our judgment, after the paper was signed by one and accepted by the other party, it was quite immaterial from whom it issued in the first instance; and we advert to the fact that it was actually an offer of sale by the plaintiff, only to demonstrate, that by defendants' own argument, it expressed the engagement as well of seller as of buyer. We affirm these propositions as true beyond doubt of discussion, namely, that where a written offer containing expressly or by implication all the engagements appropriate and necessary to the agreement, is signed by one party and accepted by the other, it constitutes such a complete contract between them that oral evidence is inadmissible to add to its terms * * *"

The case of *Rast et al. v. Bergquist,* 182 Minn. 392, 235 N.W. 372, holds:

"The parol evidence rule applies whenever the parties have formulated and agreed upon a writing as the final repository and conclusive and complete evidence of their intentions."

In the case of *Beyerstedt v. Winona Mill Company,* 49 Minn. 1, 51 N.W. 619, the court held:

> "It is not necessary that the writing be of formal character. 'Acceptance of a written contract as such is sufficient though it is not signed by the person accepting it'. Williston on Contracts, Section 633; Lindman v. U.S. Fidelity & Guaranty Company, 163 Minn. 303, 204 N.W. 159." See also *Wiley v. California Hosiery Company* (Cal.), 32 Pac. 522; *Commercial State Bank v. Antelope County* (Supreme Ct. of Neb.), 48 Neb. 496, 67 N.W. 465; *Cohen et al. v. Jacoboice* (Supreme Ct. of Mich.), 101 Mich. 409, 59 N.W. 665; *Dunn v. Mayo Mills,* 134 Fed. 804.

Actually the evidence is clear that there was an acceptance of the terms of the written agreement by the letter of July 19, and the other actions taken by appellant. The only matter not made completely clear by the written contract and the acceptance was the listing of the property conveyed.

> "In the case of an incomplete writing, or a contract which is partly in writing and partly in parol, the written part cannot be varied by parol evidence in the absence of fraud, accident or mistake; the parts of the agreement proposed to be proved by parol must not be inconsistent with, or repugnant to the intention of the parties as shown by the written instrument." (32 C.J.S. 1029.)

(See numerous cases cited in note 80.)

By permitting evidence of an alleged prior oral agreement to convey the property in question, the

court permitted evidence to be introduced in direct conflict with the written agreement. This was done over the objection of appellant (Tr. 133, 201, 212), and the inadmissibility of this evidence was further pointed out to the court in appellant's motion for directed verdict, nonsuit, judgment notwithstanding the verdict, and new trial. Without this improperly admitted evidence there was no basis upon which a verdict could possibly be rendered in favor of appellee, and it is respectfully submitted that the judgment heretofore entered in this case should accordingly be reversed.

VI.

THE COURT ERRED IN PERMITTING TESTIMONY OVER APPELLANT'S OBJECTION AS TO THE CONTENTS OF AN ALLEGED TELEGRAM PURPORTING TO GRANT APPELLEES A CONTINUATION OF THEIR TIMBER PERMIT.

When at the conclusion of appellees' case the court permitted them to amend their complaint to a *quantum valebant* theory, from that of an express contract, it became important for appellees to show that they had a timber permit in effect in March, 1948, which authorized them to be present and to cut timber at Barry Arm. Part of their claim that appellant had purchased their property was based on the allegation that Mr. Lambert had cut timber belonging to appellant.

Mr. Jacobson, Supervisor of the Forest Service of the area where Barry Arm is located, was called as a witness and testified that appellees' permit had

expired on December 31, 1947, and was not continued until July, 1948; so that during the period when the alleged sale occurred, appellees had no timber rights (Tr. 311, 327).

It was under these conditions that appellees, through their witness Lambert, offered oral testimony as to the contents of a telegram alleged to have been received by Mr. Agostino from the "Forest Service in Juneau" in March of 1948, purporting to continue appellees' permit to cut timber in the Barry Arm area (Tr. 583-585). Objection was made to the introduction of evidence as to the contents of this alleged telegram on the grounds of hearsay, but the court permitted the witness Lambert to testify as to the contents of the alleged message. The ruling of the court in allowing this testimony was erroneous and substantially prejudiced appellant's case.

As stated in 31 C.J.S. 933:

> "Further, a written statement is equally inadmissible under the rule excluding hearsay evidence where the form is * * * as in the case of telegrams."

Bebbington v. California Western States Life Insurance Co., 30 Cal. App. (2d) 157, 180 Pac. (2d) 673;

In re Cassidy's Will, 50 N.Y.S. (2d) 628, 182 Misc. 436, reversed on other grounds, 52 N.Y.S. (2d) 809, 268 App. Div. 633;

James v. Paramount-Famous-Laske Corporation, 138 Cal. App. 585, 33 Pac. (2d) 63;

James R. Kernan Company v. Cook, 162 Md. 137, 159 A. 256;

Gulf C. & S. S. Ry. Co. v. Hill (Texas), 284 S.W. 594;

Continental Trading Company v. Seattle National Bank, 199 Pac. 743, 116 Wash. 479.

The court overruled appellant's objection on the theory that "official communication upon the subject —upon anything concerning the subject of the action I think would be admissible." (Tr. 584.)

The fact that a message contains what may be regarded as an official communication gives rise to no exception to the hearsay rules. The Territory of Alaska has an express statute providing for the introduction of official records.

> "Proof of judicial, legislative or executive records. A judicial, legislative, or executive record of said Territory, or of any State or Territory of the United States, or of any foreign country, or of any political subdivision of either, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof, with the seal of the court or the official seal of such person affixed thereto, if it or he have a seal, or otherwise authenticated as required by sections 1738, 1739 and 1942 of 28 USC (1948 Edition)." Section 58-1-3, A.C.L.A., 1949.

Had appellees been granted a continuation of their permit to cut timber, it would have been a simple matter to have secured an official copy of the continuation order from the Forest Service Office in Juneau duly authenticated in accordance with this provision. The

testimony in regard to the telegram is at most a statement by the witness Lambert as to what some individual in the Forest Service said. The person in the Forest Service who allegedly wrote the message purporting to extend the timber permit was not before the court for cross-examination, and the testimony as to the alleged telegraphic message from him was clearly inadmissible.

VII.

THE COURT ERRED IN ALLOWING APPELLEES FURTHER TO AMEND THEIR AMENDED COMPLAINT AFTER APPELLEES HAD RESTED, SINCE THE SECOND AMENDED COMPLAINT WAS BASED ON A SUBSTANTIALLY CHANGED CAUSE OF ACTION.

After appellees had rested their case, appellant moved for a directed verdict or, in the alternative, for a nonsuit (Tr. 271-276). The amended complaint had set forth two causes of action, both based on an alleged oral contract of sale of appellees' property, for the fixed price of $25,000. This amended complaint made no mention of the reasonable value of the property alleged to have been sold, and the value of such property was not an issue.

The District Court agreed that there was "not sufficient evidence to warrant putting the case to the jury" (Tr. 279, 280) upon either the first or third causes of action (the second cause of action had previously been stricken). The appellees, however, were permitted to amend their complaint, on the theory of

a sale and delivery for a reasonable value. The amended complaint was filed on the succeeding day, and while the trial was still in progress, it was necessary for appellant, much to its prejudice, to prepare an answer, affirmative defense and counterclaim, and to attempt to get the evidence in regard to the reasonable value of the property alleged to be sold, and to attempt to defend on this entirely different basis.

Section 55-5-76, A.C.L.A. 1949, provide as follows:

> "Amendments allowed by court before trial or submission. The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause, and in like manner and for like reasons it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, *or when the amendment does not substantially change the cause of action or defense,* by conforming the pleading or proceeding to the facts proved." (Emphasis ours.)

The only authority of the District Court to amend a complaint is where it does not "substantially change the cause of action or defense". In changing this cause of action from one on an express oral contract for a fixed price to an implied contract for the reasonable value of the property, a substantial change was made in the cause of action which was beyond the power of the District Court and resulted in material

prejudice to the appellant. As stated in 41 Am. Jur., Section 374:

> "Under modern practice as well as at common law, a plaintiff can not sue on one cause of action and recover on another. Any other rule would lead to interminable surprises and consequent injustice."

The specific type of amendment allowed in the subject case is discussed in 41 Am. Jur., p. 551, wherein it is stated:

> "If the plaintiff in his declaration or complaint relies on an express contract, he must prove it as laid, and can not support his case by proof of an implied one, *especially in the absence of an allegation of value.*" (Emphasis ours.)

Had appellees, in their amended complaint on which the case was originally tried, referred to the reasonable value of the property, the appellant might have had reason to be prepared to defend on that basis. As it was, appellant prepared for the trial and undertook the defense of the case as against the allegation of an express contract to sell the property for a fixed price. It was impossible for appellant to make the necessary preparations and to defend the suit on the new cause of action. The rule of law in this situation is further stated in 50 LRAns at p. 16, as follows:

> "Nor where he declares upon an express contract, can he recover upon an implied contract on a quantum meruit". *Sanders v. Hartge* (Ind.), 46 N.E. 604; *Vedder v. Leamon,* 75 N.Y.S. 431; see also *Davis v. Chase* (Ind.), 64 N.E. 88 at 89;

Re Oldfield, 175 Iowa 118; *Wright v. Geer*, 6 Vt. 151, 27 Am. Dec. 538.

Accordingly, it is respectfully submitted that the District Court erred in permitting the amendment of the complaint after appellees had rested, since the amendment resulted in a substantial change in the cause of action and material prejudice to the appellant.

VIII.

THE COURT ERRED IN DENYING APPELLANT'S MOTIONS TO STRIKE PORTIONS OF APPELLEES' SECOND AMENDED COMPLAINT AND MAKE MORE DEFINITE AND CERTAIN, AND TO STRIKE PORTIONS OF APPELLEES' REPLY, SINCE IMPROPER ALLEGATIONS HIGHLY PREJUDICIAL TO APPELLANT WERE PERMITTED TO GO TO THE JURY BY VIRTUE OF THE COURT'S DENYING THESE MOTIONS.

The appellees were permitted to amend their amended complaint after having rested, and to proceed on a new cause of action. The Second Amended Complaint which was filed did not name the person or persons representing the appellant in the alleged sale and the alleged taking of possession of appellees' property. Appellant was entitled to this information.

Subsequently, appellant filed its Answer and Counterclaim to Second Amended Complaint, to which appellees filed a Reply. This Reply contained a great deal of matter which was improperly pleaded and which was highly prejudicial to appellant's case. These portions of the Reply actually constituted written arguments to the jury rather than pleading ulti-

mate facts. *Sovereign Bank of Canada v. Stanley,* 176 Fed. 743; *West Jersey & S. R. Co. v. Cochran,* 266 Fed. 609, 49 C.J. 40-43, note 80.

Thus, in paragraph 1 of plaintiff's reply to defendant's first separate answer, after denying with a few exceptions the allegations contained in that paragraph, appellees entered into a long dissertation stating:

> "and further allege the facts to be that said oral agreement was an offer of compromise and was not based upon any consideration, and that the defendant failed, neglected, and refused to go through with said agreement, and that the compromise made on behalf of Bruno Agostino was by reason of having spent two or three months trying to get the defendant to pay him for his property, and that Bruno Agostino had an agreement with the president of the defendant company, Thomas Morgan, that he was leaving Barry Arm Camp, and would return in two days and settle with him, and that Bruno Agostino had waited there at the camp for a period of approximately three weeks, and that Thomas Morgan never returned to pay him for the equipment, and that by reason of the promises made on behalf of the defendant company, the plaintiffs had permitted the defendant to come onto his property, and to take possession thereof, and the defendant had gained exactly what it had wanted, by getting in possession of plaintiff's property, and then by dodging the plaintiffs and failing to meet one of the plaintiffs, Bruno Agostino, and had worn him out by dodging him, and running around over the country until, the plaintiff was desperate fi-

> nancially, and that said agreement to settle for \$10,000.00 was entered into by Bruno Agostino, rather than to go to Court, and have to employ counsel and pay court costs and other expenses that he was not able to pay, all of which, amounted to oppression, duress, and fraud on the part of the defendant, which fraud was perpetrated by Thomas Morgan, president of said defendant company." (Tr. 39-40.)

The pleadings in this case went to the jury at the conclusion of the case and quite obviously such irrelevant, frivolous and sham matters as quoted above, had an adverse effect on appellant's case.

The extent of the court's leniency in permitting such obviously improper matters to remain in the pleadings which went to the jury, may be seen when paragraph 14 of appellees' reply is read. This paragraph replied to paragraph 14 of appellant's first separate answer and affirmative defense, in which it was alleged that one of the tractors alleged to have been sold to the appellant, was repossessed by its owner, Ellamar Packing Company, on or about October 1, 1948, and that the other tractor and donkey engine were repossessed by Raymond Grasser under a claim of ownership on or about September 25, 1948. The appellees denied having sufficient information "as to the facts alleged in that paragraph to form an opinion as to the truth thereof and therefore deny the said allegations and the whole thereof". Then, after denying that the tractors and equipment were so taken, appellees went on to plead as follows:

> "and allege on information and belief that if the Ellamar Packing Company and the said Ray Grasser did take any of the property sold by the plaintiffs to the defendant, that the same was taken through a scheme and conspiracy brought about by the defendant for the purpose of cheating and defrauding these plaintiffs * * *" (Tr. 43, 44).

Obviously, after denying that the tractors were taken and denying any information and belief in regard to this matter, there was no basis whatsoever for appellees' alleging that appellant had schemed and conspired to cheat and defraud the appellees by having the equipment taken by third parties. It is hard to imagine material much more prejudicial than these allegations which went to the jury at the conclusion of the case. Appellant by timely motion requested that this portion of the Second Amended Complaint be stricken (Tr. 49). The court, however, overruled this motion.

It is true that the court, after argument had been made to the jury, did give an instruction that this portion of appellees' complaint should be disregarded, since there was no evidence upon which such an inference could reasonably be made. This, however, did not cure the fact that the pleading containing this highly prejudicial matter was permitted to go to the jury, so that during the jury's deliberations they had before them this printed offensive and prejudicial matter.

It is accordingly respectfully submitted that the court below erred in denying appellant's motions to strike portions of appellees' second amended complaint and in denying appellant's motion to strike portions of appellees' reply.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed and the case should be remanded to the court for entry of a judgment in favor of appellant, as prayed for in the original Answer to Amended Complaint and in the Answer to the Second Amended Complaint.

Dated, Juneau, Alaska,
February 24, 1950.

Respectfully,
FAULKNER, BANFIELD & BOOCHEVER,
R. BOOCHEVER,
Attorneys for Appellant.

No. 12,393

IN THE

United States Court of Appeals

For the Ninth Circuit

COLUMBIA LUMBER COMPANY, INC. (a corporation), *Appellant,* vs. BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of Barry Arm Camp, *Appellees.*	

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEES.

FILED

MAY 9 1950

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No. 12,393

IN THE

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Appellant,

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Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

Appellees will now endeavor to make a brief but clear statement of facts developed by the evidence, and at the same time considering the fact that the principal assignment of error is insufficiency of evidence to sustain the verdict of the jury, and the judgment of the Court, we are sorry that we can't agree with the statement of facts set forth in appellant's brief, for in many instances very material matters

are completely left out, and in some instances the statement is more of a conclusion of the appellant, than the actual facts established by the evidence, or possibly that which appellant is unconsciously thinking, should be the facts. This action, as shown by the amended complaint, was set up in three causes of action, as is shown by the transcript of record, page two, and to this amended complaint, an answer was filed (Tr. 8); then a second amended complaint was filed by direction of the Court on June 2, 1949 (Tr. 12); to this second amended complaint, a long answer was filed as is shown by the record, page 18. The issues were joined by the reply filed. (Tr. 37.)

Bruno Agostino, one of the plaintiffs, was first called as a witness, and testified, that he was seventy-one years old; lived in Anchorage since 1916, except the years of 1944, 1945, 1946, and 1947, at which time he was engaged in a logging business with the other plaintiff at Barry Arm. Plaintiffs had built several buildings there, including cook house, bunk house, and garage, some of which were modern in every way. One was a 24′x30′, two-story building; that plaintiffs owned a D-8 caterpillar, a donkey engine, 2400 feet of cable, necessary blocks, a sawmill, and much other property described in the Tr. 113 to 119. That the camp was equipped for a crew of twelve men; they had plenty of trap logs; the piling was in; they had established a log pond by setting piling and chaining floating logs between; that in October 1947, he and his partner had purchased from the Government, a right to cut 250,000 board feet of logs, and had paid

by check for the permit. This being the third or fourth permit that had been issued to them. That the permit was issued in October, too late to cut timber in the fall, but plaintiffs were prepared to cut this timber in the spring of 1948. (Please note original check in the sum of two hundred fifty dollars ($250.00) as an exhibit). That they had two other permits before the issuance of this one; that they had cut the timber evidenced thereby, and the two hundred fifty dollars ($250.00) check was an advance payment for 250,000 board feet that plaintiffs were permitted to cut in 1948.

He further testified that in March, a Mr. Lambert appeared at the mouth of Mosquito Creek with machinery and a scow; that Mr. Lambert (superintendent of the logging camp for Columbia Lumber Company, Inc.) wanted to land there in the midst of the plaintiffs' operations. That a conversation took place in which Mr. Agostino told Mr. Lambert that he couldn't land there; that if he let him land there, it would stop and block the plaintiffs, and they couldn't operate. That Mr. Lambert then went away and came back a week later. Then, the witness described plaintiffs' operations at the mouth of Mosquito Creek as follows: Mosquito Creek was a small stream, too small for two outfits, only large enough for one; that one outfit operating by putting logs in the channel, and refting, was all that could work there. That in low tide, Mosquito Creek was about 18′—20′ wide, and in high tide, 20′ of water in the channel, 10′ on the sides of the channel. That plaintiffs had a boom in there

made of logs chained together across Mosquito Creek, and had made what they called a log pond. That pilings were set or driven and boom logs and chains fastened between them. Plaintiffs had operated that way since they went in there.

That their boom logs closed the mouth of Mosquito Creek, and no one could get in and out with a boat, only room enough for one boom, or one raft. That plaintiffs had had three Government permits prior to this one referred to and had taken out 750,000 feet, board measure of logs. A map was identified and introduced, as Exhibit 2. This map showed plaintiffs' buildings and improvements, the logging woods that had been cut over, and the tract that had been purchased to cut. He then explained the various buildings, the log pond, and all parts of the map, see Tr. 125, 126 and 127. It also showed the saw mill, the logging roads built by the plaintiffs with their D-8 caterpillar. Mr. Lambert was shown the roads and everything. Mr. Lambert and Ted Rowell came back a few days later in a boat, some of the men stayed in the boat, and Ted Rowell and Kenneth D. Lambert came ashore; they had a conversation; they showed him a letter from the Columbia Lumber Company to move into the pond; also a telegram from Juneau. Bruno Agostino told them they could not land. Mr. Lambert had the telegram. It was from Mr. Morgan. Lambert showed Mr. Agostino the telegram, Agostino read it and gave it back to Lambert; Agostino offered to sell out to Columbia for $25,000.00; Lambert went to call Mr. Morgan on the long distance telephone

about buying Agostino out; Mr. Lambert came back about March 21, or 24th, in a boat. A Mr. Griffen or Cliffend also came. Ted Rowell came. They came in a small boat powered by a gasoline engine, used to pull rafts. The boat was working for the Columbia Lumber Company. Mr. Lambert and Mr. Ted Rowell told Mr. Agostino that Mr. Morgan would come on the 10th of April and settle with him. The price of $25,000.00 was again discussed. Agostino again told them his price was $25,000.00, $19,000.00 for the machinery and $6,000.00 for the rest of the buildings, cable and things that were there, including the blocks and all material. That he, Agostino, was familiar with the value of the equipment at this time; that they paid $25,000.00 for the equipment and machinery, offered to sell it for the same amount, $25,000.00. Mr. Ted Rowell said that he spoke to Mr. Morgan on long distance, and told Mr. Morgan what Agostino's price was. That Mr. Rowell said that Mr. Morgan told him to go ahead, said Mr. Morgan was going to be up on the 10th of April and settle with Agostino. Mr. Morgan came on the 10th of April, gave orders to start the cats, and "see how they go", and promised to come back in two days and settle with Mr. Agostino. That Morgan never did return, he never paid anything; never paid a red penny. When Mr. Morgan said he would come back in two days and settle, Agostino told Morgan, Lambert and Rowell that they had full possession to Columbia Lumber Company. He let the scows land. He told them to use all his machinery, his bunk houses, everything, and his timber. They

straightened up his machinery, went into Agostino's garage, and got whatever they needed, back and forth, for pretty near a month. Then they went through his pond to cut the timber down. They were there about a month before they actually started cutting timber. When they started cutting timber, Agostino came to Anchorage. They cut his timber first. They promised to come in and pay, and he never did see Mr. Morgan, he went and employed Mr. Butcher, nothing has been settled so far; never received a red penny. He and Mr. Butcher went back to the place; took an airplane and landed there; took pictures. Agostino's timber was all cut down, his pond was being used. They had possession of everything; Agostino gave them possession. Then he identified many pictures. (Tr. 136-159, incl.) Starting on page 160 Tr., Agostino describes the log pond as being a little lake where they stored the logs, surrounded by what is called a boom, made of logs tied together at each end with a chain or cable, put through a hole in the end of the log. They had piling in there, the logs fastened between the pilings. All boom logs equipped that way. Plaintiffs drove the piling. Agostino and Mr. Socha drove them. There were about thirty of them. They were hemlock pilings, about 15 feet long. They pulled the logs into the pond with a cat. The pond was 1,000 feet from the bunk house on the east side. He had a conversation with Blackie Lambert and Ted Rowell about March 24 while sitting in a little cabin about 500 feet from the main camp where he was living at the time, about five o'clock p.m. The first trip they came was about March 20, that was in the morning. They had a

conversation, went away, they came back later, about 24. That conversation was when they made the deal, the camp was turned over to them. The possession was given to them.

They then came in with the scow, boat, and machinery, the whole outfit. They were going to pay me my price, $25,000.00—$19,000.00 for the machinery, $6,000.00 for the rest of the stuff. He went and called Mr. Morgan, came back to me and say, "Mr. Morgan will come up on the 12th of April and settle with me". Mr. Morgan did come on the 10th of April, give orders to start the machinery. Mr. Lambert started the machinery, Morgan never came back. (Tr. 165-166.) He then testified that he had given them a price, they went away to talk to Mr. Morgan and came back and told him that Mr. Morgan said it was all okeh. They went back to Whittier and then back to Barry Arm. They came back and said everything was all right, that they would go to Hobo Bay and get the outfit and Agostino said okeh, you have got the full possession. They came back with the outfit, in five or six hours. (Tr. 167.) The place occupied by the plaintiffs was the only place that the defendant could enter to take out the timber on upper Mosquito Creek, and Mosquito Creek was not large enough for two logging companies to operate on. When one company was operating, the other could not, one company completely closed the waters. (Tr. 168.) Agostino waited a month for Morgan to come back and pay off. They landed the scows, fixed the machinery and waited for the snow to go away, then moved in back of the pond.

They didn't start using the bunk house and camp house until Mr. Lambert came out and a new foreman came in, then they took everything over, Mr. Lambert was running the camp, the logging for the Columbia Lumber Co., he was director of the camp. Agostino went back there about the 29th or 30th of August, stayed until September 2, stayed in the little cabin back of the camp, his old prospecting cabin, small cabin, 10x12 feet. He didn't interfere with the camp at all. The machinery started operating about the 11th of July, 1948. They started moving the machinery then, using the oil, using the gas, using the bunk house, a barrel and one-half of gas, six barrels of diesel oil. They were operating back of the pond. (Tr. 171-172.) July 11, 1948, they moved up to their new camp. Agostino testified that his cats were being used when he was there. He took a lot of pictures of the machinery working up to their camp. They are the small pictures identified the day before. That was about August 30, 1948.

And, on cross-examination by Mr. Boochever, he testified:

Mr. Grasser sold his interest to Agostino and Socha, who were the sole owners of the camp. Grasser withdrew, a settlement was made, an oral contract. He was paid $1,700.00 by a check. He has not been back to the camp since September. The D-7 cat cost $5,000.00 and the donkey, $4,000.00. He stated that he did not know whether any of the property had been taken away or not. (Tr. 174-175.) He considered the other cat paid for in 1945. (Tr. 176, 177 and 178.)

He further testified that he told Mr. Lambert in March that Grasser claimed the tractor and the donkey, but Grasser did not own them. That he had three different timber contracts. One block that had never been touched; four blocks altogether; three had been logged over, one never touched. The last one already cut off by Mr. Morgan's order. He said he told no one that he was not going to do more logging. Then the application for modification of an agreement dated June 23, 1945 was introduced in evidence by the defendant. (Tr. 181-182.) It was turned over to the Forestry Service about the 10th of July, 1948. The modification agreement was made after the timber had already been cut. The witness paid $250.00 on October 31st for another 250,000 feet, the check was cashed, introduced into evidence. Agostino said he had stayed at the camp all during the winter prior to March 1948. He told Mr. Lambert not to land there because it would interfere with his operations. He had no gun, didn't threaten to shoot him, didn't threaten to shoot anybody. Lambert came back. He didn't permit him to land then because he told Lambert he would interfere with him, from logging here in the pond at the time. He told Lambert he couldn't land there. He then went back, he said maybe the company would want to buy me out, if they did, they could pay my price. Mr. Lambert said he would talk to Mr. Morgan and then come back again. Mr. Lambert came back a second time. The witness told Mr. Lambert he would sell for $25,000.00 at that time. He said he would go back and see Mr. Morgan again, he owned the right to use the land, and one permit

at the time, besides the equipment. He paid the Government to use the land, he had the right to cut the timber and travel all over that land and hold the land, the right to have the channel for his own use, why should another fellow come in there, and block him out. " 'If you go to cut log timber, you have to get a permit from the land office of the United States.' " He did that. The Government gave him the right to cut the timber and sell it. He had a bunk house, a cook house, machinery, and etc.—a D-8 caterpillar, a D-7 caterpillar, a diesel engine about 95 H.P., a donkey, lots of stuff, blocks, cable, $15,000.00 worth of stuff lying there, besides the machinery. Mr. Lambert and Mr. Rowell came back March 24, at that time they told him that they had had a talk with Mr. Morgan, eight minutes long distance, and he told all that he said. He gave possession to Mr. Lambert, turned the pond and everything over to him, gave him possession, turned over everything. Told him, I stay in the little cabin, that prospecting cabin five hundred yards from the bunk house. He landed and took possession of the camp, cut the witness' timber. He took possession of the main camp. He went in the garage, got pipe wrenches and everything he wanted with the exception of taking the machinery out. They used the other stuff. They went in the buildings. They used the building for a warehouse. Kept stuff in there out of the rain. Didn't use the cats at that time. Didn't sleep in the buildings then. They walked across, they went in the bunk house, they went in the machine shop got what they wanted and would go back in again when they want to, never ask permis-

sion. He told them that it belonged to the Columbia Lumber Company when he give them possession. That was their property. One month later, they set up a camp across the pond, they first just landed at his cabin, stay there until they moved, lived in the small house on the scow. They fixed their own machinery. On April 10, Mr. Morgan came, talked to the witness, property had already been sold to him for $25,000.00. He said start the cats and I will come back in two days and we will make a settlement. (Tr. 190-191.) He never came back any more. Mr. Morgan told him he was buying the property on April 10th. Was going away and would be back in two days and settle with him. He agreed to buy it. "He said he come back in two days and settle with me." (Tr. 192.) The witness stated that he stayed in the little cabin waited for the gentlemen to come back, and he never came back and later he went into town; that was later in May, went to see a lawyer, Mr. Butcher. They got a plane and went back in June. The Columbia Lumber Company had its camp set up about one-half a mile up the creek, still on his property, on the edge of the pond, working his permit. They set their camp up at the edge of the pond. He and Mr. Butcher came back to town together. Mr. Butcher called Mr. Morgan on the phone. Morgan came up about the end of June. He sent a telegram but Mr. Morgan never came around. He thinks he came up in July. A contract was drawn, Agostino signed it, but Morgan didn't then. The contract was introduced in evidence as Exhibit "B". (Tr. 196.) The contract was dated July

29, should have been June 29. He signed it June 29th. The contract was sent to Mr. Morgan for his signature. Mr. Morgan never signed the contract. (Tr. 202.) After that he went back to Barry Arm again in August. "The defendant was using the cats". had taken them over to their camp July 10th or 11th. The employees of the Columbia Lumber Co. were living in witnesses camp, the old camp; Mr. Morgan himself was there, Mr. Hooper and Mrs. Hooper, and a few of the fellows. He saw them there the 30th of August. Hooper said Mr. Morgan gave him authority to stay right there. The witness stayed in his little cabin two days and then came to Anchorage. He went there because his pots and clothing were in the little cabin and the company did not want the cabin. When he was there, the cats were being used, he saw the D-7 dragging logs.

On redirect examination, he testified:

That he had Mr. Butcher call Mr. Morgan to come up and settle, but he never came. The witness was not in Anchorage in July. He had no knowledge that Thomas Morgan ever signed the contract. He never came near the witness. He never knew before today that Morgan had signed the contract. He then examined *his copy* of the contract, stated that Morgan never signed it. One is marked July 5th, the other July 29th. This was the only copy he was ever given. It was never signed by Mr. Morgan. That is the only thing he ever had. The matter was then called to the attention of the Court that there was no pleading by

the defendant indicating the contract was ever signed. The witness then testified that he was at Butcher's office, Mr. Morgan stepped in just two minutes, made a compromise offer of $10,000.00, Mr. Butcher drew the contract, gave it to the witness to sign, the witness said when will Mr. Morgan sign it, Butcher said we would send it to Juneau, the witness signed the contract, it was sent to Juneau, he waited one month, the contract never came back, was never signed by Mr. Thomas Morgan and he went to Whittier on the 10th of July, he met Mr. Morgan, asked him if he was going to sign the contract, he said yes, but never did. He met him again in the Barry Arm, asked him about the contract he said come to town and I will give you the money. The witness came to town and never saw the gentlemen, and the contract not signed either. He never knew Morgan signed it, and in late September he met Morgan, told Butcher the contract is out, I will have nothing to do with it because he never paid one cent, and he never signed the contract, and he then started this suit. (Tr. 212-213.) No one had ever paid the witness a red penny. He never saw Mr. Morgan thereafter, until in Court now. He got Mr. Bell and Mr. Ross to start suit against Mr. Morgan for his money. He signed the $10,000.00 compromise settlement to avoid trouble, but Morgan did not sign the compromise contract at all.

Further on redirect, it was stipulated that no money had ever been paid into the office of the Court Clerk for the plaintiffs.

Then Kenneth D. Lambert was called by the plaintiff and testified to his name, and to his nickname of "Blackie". Stated that during the fall of 1947 he made a timber cruise for the Columbia Lumber Company with Mr. Rowell, and made a report to the Columbia Lumber Co. when he returned. He was employed to make the trip by Mr. George Morgan of the Columbia Lumber Company. One of the places he went to was Barry Arm. Went up Mosquito Creek three or three and one-half miles. Identified a report made at that time. Mr. Morgan had the report typed. The girl in the Columbia Lumber Company office typed it, in the office at Whittier. The witness was given a copy of the report. He left Whittier to make the trip, he went by boat, left the boat parked in front of Mr. Agostino's house in the bay. Went afoot from there, about three and one-half miles. Made a general survey of the timber that could be reached for logging in that area. Next saw Barry Arm Camp in the spring, at which time he was working for the Columbia Lumber Company in the capacity of a foreman, more or less. Went there to see if there was any ice in the river and to see if they could take equipment in. Saw Mr. Agostino, had a conversation with him. Mr. Agostino informed them that they couldn't move the equipment in. That he had a timber sale in there and prior rights thereto. Talked possibly an hour. Nothing was said about buying Agostino out in that conversation. Left and went to Whittier, reported to Ted Rowell, the mill superintendent for the Columbia Lumber Company, the defendant in this

action. Told Mr. Rowell what took place. Then testified that they called Mr. Morgan in Juneau, explained the situation to him. He said Mr. Agostino had no rights to the timber whatsoever, that they had bought all of the rights, and that they were to go ahead and move in. They then went back and talked to Mr. Agostino again at Barry Arm, near the camp. That was possibly a week after the first trip, around the 20th of March, or maybe the 15th. Mr. Rowell, the foreman or superintendent for the mill of the Columbia Lumber Company was with him. There was a conversation. Mr. Agostino said they couldn't move in until some provision was made for buying him out. He showed us a telegram he had received from the Forestry Service. He gave us the telegram to take back. I gave the telegram to Mr. Rowell, he has it in his possession. It was a telegram from the Juneau office that he had a continuation of his timber sale of 250,000 bd. feet. They then went back to Whittier. communicated again with Mr. Morgan. There was a price mentioned. Mr. Agostino wanted $19,000.00 for his equipment, plus $6,000.00 for his buildings. He gave the information to Mr. Morgan. He had a telephone conversation with him. They both talked to Mr. Morgan, he and Mr. Rowell. The witness was well acquainted with Mr. Morgan, knew his voice. We told Mr. Morgan of the condition, that there was a camp, that Mr. Agostino didn't want us in there, and I think we mentioned the price to Mr. Morgan over the phone at the time. Mr. Morgan said if he wouldn't let us move in and there was indication of any trouble

like that, to have him put off. To get the marshal and have him put off, if it was necessary. Later Mr. Morgan sent a telegram that he would be up and make some kind of arrangements with Mr. Agostino. That was supposed to be sometime around the 10th of April. I think Mr. Ted Rowell went back with me. We had a conversation with Mr. Agostino. It was possibly around the 25th of March. We showed him the telegram that Mr. Morgan would be up and make some kind of a settlement with him. The price was not mentioned in the telegram. The only price I ever knew was $19,000.00 for the machinery and equipment and $6,000.00 for the buildings. The witness made the fourth trip in. In the meantime Ted Rowell had tried to get the United States marshal to dispossess Mr. Agostino. The marshal did not do it. (Tr. 226-227.) The marshal never went there. The witness then called Mr. Morgan in Juneau, called him or sent him a wire, he couldn't remember. Informed Mr. Morgan that Agostino refused to move. Morgan said he would come up and settle, make some settlement with Mr. Agostino. The witness went back with Mr. Ted Rowell, told Mr. Agostino of the conversation. That was in the latter part of March. The witness testified that we informed Mr. Agostino that Mr. Morgan would be up and make settlement with him. Mr. Agostino said, "Go ahead and move in, he would give us free access to the camp and the ground, and everything". He stated we could have possession of all of the premises if Mr. Morgan was coming up to make a settlement with him. We then took possession. We were acting for the Columbia Lumber Company, were

regularly paid employees of the Columbia Lumber Company, at that time. They then unloaded the bunk house and started falling timber, getting ready to log. Stayed there until July. Terminated his logging contract with the Columbia Lumber Company on the 14th of July, cut no more timber there. Ieft the Columbia Lumber Company at that time. In February he had signed a contract with the Columbia Lumber Company to start cutting timber the 15th of April. Agostino stayed there about a week or two. He stayed in his own little cabin, in the close proximity. He started the cats up to inspect them to see what kind of condition they were in, and that was all he used them, was there on the 10th of April when Mr. Morgan came. Mr. Agostino offered the equipment to Morgan for $19,000.00, and $6,000.00 for the buildings. Mr. Morgan said he thought the price was too high. Mr. Morgan then tried to rent the property for $300.00 per month. Agostino wouldn't rent it. There was a conversation then about starting the cats and seeing how the equipment would work. Mr. Morgan then issued the order. The witness started the cats up to see what condition they were in. Listed all the parts that would put them back in first class shape. Gave an estimate of $10,000.00 for the repair of the two cats, that would put them back in excellent condition. The cast would cost originally $18,000.00 for the D-8, and $16,000.00 for the D-7, the donkey engine around $6,000.00. There were blocks and lines there, of the reasonable value of $1,200.00. The donkey engine was worth $5,000.00, or possibly $4,500.00. There was a big sled on which it was mounted. He testified

he had been in the logging business twenty years, all during which time he had operated logging equipment and machinery similar to that at Barry Arm, was familiar with the value of the equipment, like the equipment had there by the plaintiffs in this case. That the reasonable value of the sled on which the donkey engine was set would be six to eight hundred dollars. It was in good condition. The two cats would be of the reasonable market value of approximately $5,000.00 apiece. Would hesitate to set the value of the sawmill; the tools, drill press, vice and anvil and miscellaneous tools would be worth around $1,000.00, there were around twenty boom logs with chains. The chains were worth $7.00 apiece. The logs would be worth the scale thereof, around 700 feet to the log. Worth $21.00 a thousand. He observed the roads, there were three or four of them. The cost of roads would be around $100.00 a station, approximately $1.00 a foot. The bunk house had some mattresses and springs, 250,000 feet board measure of logs would be worth, the trap logs would be worth around $45.00 a thousand, or $21.00 a thousand for the ordinary logs in the water. There was an electric light plant there; a battery charger; some diesel oil and gasoline, those were used. He never had any obstruction from Agostino in any way after he landed. We were free to go upon the premises at any time and use anything we wanted to use.

Then the lumber cruise report was introduced in evidence and read. (Tr. 242.) The timber was good. There was no way for two outfits to work without

one blocking the other. It had to be one exclusive operation. The pond was used by him. It was a body of water staked with piling, all the way around, a place to raft logs, eight feet of water in high tide, was good rafting ground. He put the logs in the pond with the cat, then rafted them in a boom. That was done for the Columbia Lumber Company who took the logs away. The Columbia Lumber Company had made a timber purchase further up Mosquito Creek, prior to their landing. It was around three miles up. Mosquito Creek is not a navigable stream. He started logging at the edge of the ground which had been logged by the Barry Arm people. It was a continuous operation.

On cross-examination, he testified:

That he went up to Barry Arm in March 1948, was working for wages for the Columbia Lumber Company at the time, was on the company payroll, was paid wages by the company.

A written contract was then introduced in evidence as Exhibit "D". (Tr. 249.) He was to start producing as of April 15th. He went there for the purpose of moving in the camp from Hobo Barry to Barry Arm. The camp and the A-frame were about to sink. They were covered with ice and snow. He was sent there to get them out. He moved them. That he delivered Mr. Morgan's message to Mr. Agostino to the effect, that Mr. Morgan would be up on the 10th of the month to make some necessary provisions or arrangements for the purchase of his equipment. Then Mr. Morgan came up around the 10th of April. Mr. Agos-

tino demanded one-third down. The cats were then inspected. The Columbia Lumber Company had one cat. The camp was landed in the end of the pond, the roads were used. (Tr. 256.) Mr. Rowell tried to get the marshal to come out and evict Mr. Agostino.

On redirect examination he testified:

That he received wages for the month of March from the Columbia Lumber Company as an employee, identified voucher detached from his check. This was accepted in evidence. At which time he was engaged in the business of the Columbia Lumber Company. (Tr. 261.) It was his impression all the time that the Columbia Lumber Company had bought Mr. Socha and Mr. Agostino out. (Tr. 261.) He started falling timber on April 6. His agreement provided for two cats and the Columbia Lumber Company only furnished one. He recommended a D-8 cat, the company furnished only a D-7.

Stanley Socha was then called and stated he was a partner with Bruno Agostino in the operations at Barry Arm Camp. He helped build the camp. Originally the pond was filled up with log stumps. They cleaned it up; it took from September until the snow left the ground to clear up the pond and build some roads; they used a cat all the time. It took four men, rough estimate, October, November, December, January, February, and March, around six or seven months' work to build the roads and the pond. They had no pile driver, so they dug holes with a shovel on low tide when the pond was dry, and put in the pilings, two rows about two feet apart, clear across the pond, and

had floating logs, so that they could rise up and down. He had given Mr. Agostino his consent to sell the Barry Arm Camp to the Columbia Lumber Company. He and Mr. Agostino were the owners.

The defendant then called E. M. Jacobsen to testify. He was supervisor for the Forestry Service. He testified that the Columbia Lumber Company did have a permit to cut timber there in the Barry Arm area, and on cross-examination, that he knew Agostino; that he had been cutting timber there since 1944, or possibly 1945, -44, or -43, was the first sale made. He identified his signature on a paper, which was "a right to cut timber", or a modification of the original timber sale and extension, to December 31, 1948, and Agostino had a perfect right to cut the timber until December 31, 1948. He never took his big boat in the mouth of Mosquito Creek, always went in there with a small skiff. It was the only way available to get the timber that was up Mosquito Creek. Agostino and Socha had operated at that place for several years, three or four years. He had seen their camp, a very fine camp. He identified a letter that was marked for identification No. 37 (Tr. 287); that the Columbia Lumber Company watchman was in the Stanley Socha and Agostino house when he was there last. That was about a month or so ago, possibly March or April of this year. He thought about the first of May. The watchman is Mr. Hooper. He saw the sawmill there, about six or eight hundred feet from the camp. The watchman is still an employee of the Columbia Lumber Company. The Columbia Lumber Company took out about two million

feet of logs. They were still cutting; still using Mosquito Creek Inlet and Outlet. They are using all of the Creek now. They have cut the timber a mile and one-half up the stream, they have rights about three miles. Agostino and Socha had 250,000 feet to cut as shown by the extension. (Tr. 292.) The Columbia Lumber Company is cutting all the timber there. The part that was allowed to Socha and Agostino has been cut by the Columbia Lumber Company. That the Columbia Lumber Company are cutting in there now. (Tr. 292.)

And on redirect examination, he testified: That Mr. Hooper was in the Agostino and Socha Camp in the Spring before the trial. (Tr. 304.)

Then J. F. Hooper was called by the defendant, and testified that he was an employee of the Columbia Lumber Company at Barry Arm, and was so employed during the fall of 1948. He was the boom man. Came to Barry Arm around the first of August. His wife was with him. He occupied one of the camp buildings of Bruno's camp. Moved there around the first of August. He received instructions from the Columbia Lumber Company to leave the camp the latter part of August. He stayed in the camp that winter. Saw Mr. Jacobsen in the Spring.

On cross-examination, he testified (Tr. 338.) He saw Agostino in late August, came in a plane. He stayed in his cabin, the little cabin off to itself. He identified a note that he had written. The note states: "Mr. & Mrs. J. F. Hooper, occupying this house by permis-

sion of the Columbia Lumber Company, August 30, 1948, witness". (Tr. 339.) Before going to Barry Arm he was the boom man for the sawmill at Whittier. *Was still living at Barry Arm Camp when he testified, in the same place.* (Tr. 340.) *Still working for the Columbia Lumber Company as boom man. They were there cutting timber the day he left. Monday, he guesses it was. Monday of the week he testified.*

Then Edward F. McAllister was called by the defendant and testified that he was at Barry Arm Camp on the 15th of April, 1948. (Tr. 343.) There was about eight men working at Barry Arm when he arrived. (Tr. 344.) Mr. Lambert left and Earl Proud came up to run the camp. (Tr. 347.) The Socha and Bruno equipment was brought over to the Columbia Lumber Company camp. Two men were working on the cats. The small cat was used to haul supplies from the beach and to haul over parts to fix the big cat. If he was going to buy it, he wouldn't give over $3000.00 for the donkey engine.

Thomas A. Morgan, the president and general manager of the Columbia Lumber Company was then called by the defendant and testified that the Columbia Lumber Company was an Alaskan corporation, organized in the Spring of 1947, operated entirely in Alaska. The company produces lumber and building materials with two different sawmills, and distributes the same, operates two boats, and other equipment. In March about the 20th or 21st, he received a long distance call from Whittier while he was in the New Washington Hotel in Seattle, talked with Mr. Lambert

and Mr. Rowell. Both men were very much excited. He recognized that it was a maneuver to force his company to take a lot of equipment he had no use for. He told Lambert and Rowell he would notify them in two or three days as to what he could do personally as to coming up. Was scheduled for a trip up in April. He returned to Juneau, wired them as to schedule, he told them to proceed into the area and go ahead with the establishment of the camp. That he would be up as previously stated. He did come up. He believed he arrived in Whittier on April 9, and made a trip to Barry Arm with Mr. Rowell, his mill superintendent at Whittier. Met Lambert and Agostino. Agostino wanted $25,000.00. That he had talked to the other gentlemen about and told the witness he would sell for $19,000.00. He later had a meeting in Mr. Butcher's office with Agostino. He was very reluctant to make a commitment at any price. (Tr. 379.) The final figure agreed upon was $10,000.00. He then testified (Tr. 389), "he secured legal advice that I was entitled to receive under the contract and informed our foreman that Barry Arm Camp at our camp, that a contract had been included and to proceed with the repairs of the tractors at that time." The tractors were taken to our camp and put in the shops and repairs were started. (Tr. 389.)

He testified on cross-examintion that a new RD or D-8 cat would cost $18,000.00, and an RD-7, approximately $17,000.00. (Tr. 427.) He testified that he did not pay any money to Bruno Agostino, did not offer to pay any. (Tr. 439.)

Then Basil I. Rowell was called as a witness for the defendant and testified that he was known as "Ted" Rowell, *that he in 1948, was manager of the Columbia Lumber Company at Whittier. Was in that capacity until last fall; was there in the spring of 1948.* Saw Bruno Agostino several times in the latter part of March, or the first of April. Mr. Lambert was with him; had conversations with Agostino. Agostino wanted to see Mr. Morgan. The witness told Agostino he would get in touch with Morgan. He and Mr. Lambert did get in touch with Mr. Morgan. Mr. Morgan said he would be up shortly. He went back to Agostino, took a wire out and showed it to him to the effect that Morgan would be there, doesn't have the wire now, doesn't know where it is. He showed the wire to Agostino. Agostino said all right, he was satisfied. Mr. Morgan subsequently came up, close to the middle of April. When Mr. Morgan came up that they went to see Mr. Agostino. Lambert was there. A conversation took place between Agostino, Morgan, Lambert and the witness. Agostino wanted $19,000.00, Morgan said it was too high.

On cross-examination, he testified that the Columbia Lumber Company furnished the equipment for use at Barry Arm and sent it up there; the equipment belonged to the Columbia Lumber Company. (Tr. 554.)

Please note the statements of Mr. Rowell in the cross-examination (Tr. 552 to 572), especially testimony about the telegram, read to Bruno Agostino.

Mr. Kenneth D. Lambert testified on redirect examination that Mr. and Mrs. Morgan, Agostino, Gilbert

and others were on a boat trip together up to Barry Arm Camp on July 10th. (This in contradiction of Mr. Morgan's testimony that he never saw Agostino from after leaving Butcher's office until late in fall. (Tr. 580.))

That in the conversation down at Barry Arm Camp on April 10 between Mr. Morgan, Mr. Agostino, Mr. Rowell and the witness, that Mr. Morgan agreed that Mr. Agostino could keep the little cabin, that it was of no use to the Columbia Lumber Company whatsoever. (Tr. 594.)

The Columbia Lumber Company assumed all obligations of the Camp One operations. "Mr. Morgan told me that I could use that equipment, that was at the time I terminated with the Columbia Lumber Company". (Tr. 598.)

Bruno Agostino testified on redirect, that when he was there he saw one of the cats, the D-7, working; it was coming from the woods toward the camp. The D-8 cat had an arch on it which belonged to the Columbia Lumber Company. (Tr. 613-614.)

I.

ANSWER TO ARGUMENT OF PLAINTIFF IN ERROR.

It is quite apparent from a careful reading of the brief of plaintiff in error, that assignment No. 1 is the assignment principally relied upon for reversal, therefore, we have gone into the evidence further than would otherwise be necessary.

First, permit us to quote the statements made by the learned trial judge at the close of plaintiffs' evidence in chief in answer to the motion for an instructed verdict. (Tr. 278.)

"In this case there was a discussion into the price, but the parties evidently didn't agree upon the price, but the Columbia Lumber Company did agree to take over the property and accepted possession of it and in that respect I am convinced that Mr. Lambert was their agent and having accepted possession of the property, they are bound to pay the reasonable value thereof."

Not only was Mr. Lambert their agent, but this whole scheme was confirmed by Mr. Morgan when he came to the property on the 10th of April. He didn't then reject anything except the price of $25,000.00. He didn't tell his people to go away and not bother Mr. Agostino any more. He was quite willing to take everything they could give, and take his chances on payment of it later, in some fashion; got it as cheap as he can, which, I suppose, is legitimate business. But he cannot be permitted to get all the benefits that Agostino could give him and then walk away saying, "I am not bound to pay anything", "you will have to look to some independent contractor, or to the man in the moon for your pay," and "it isn't worth anything." (Tr. 278.)

Appellant in its brief, quotes from the testimony of Mr. Thomas Morgan, a few sentences that if standing undenied would be favorable to appellant's theory set

forth in this appeal, but this testimony denied and disputed by other witnesses, creates a disputed question of fact, and the same is true as to all quotations set out under this assignment of error.

Under the circumstances established by the evidence, the jury and the trial Court had a perfect right to find for the plaintiffs. There was an offer to sell by plaintiffs, and an acceptance by defendant, and the defendant would be estopped to deny liability to the extent of the value of the property and rights surrendered by plaintiffs which were taken by defendant, and the verdict of the jury and the judgment of the Court, being well within the range of value of the property and rights delivered as testified to by creditable witnesses, should not be disturbed on appeal.

The cases cited by appellant do not, in our humble opinion, sustain their contention and in most cases are not in point.

The first case cited by appellant, to-wit: *Work v. Kinney,* 63 Pac. 596, is not in point at all. This is an action against a sheriff, and a careful analysis of the case leads us to the conclusion that it is contrary to the contention of appellant. And the next case, *Cannon v. Fidelity Phenix Fire Insurance Company,* 205 N.W. 942, and modified in 207 N.W. 528, is a fire insurance case where certain wheat did not belong to the policy holder, and we can't understand anything in that case that would lend any comfort to the appellant; the *Phillips v. Yarter* case found in 156 N.Y.S. 875, is not in point; it was a case where it was obvious

that the plaintiff gave false testimony upon which the judgment was based, and the testimony was later established to be false by documentary evidence and indisputable circumstances; and the next case cited, *National Life and Accident Insurance Co. v. Langston,* 42 S.W. (2d) 1037, is based upon a false statement in an application for insurance; and the *O'Brien v. Allston* is a Utah case, 213 Pac. 791, misses the point involved, so far, and such a different set of circumstances are involved, that we cannot see the relevancy thereof. The *O'Brien* case involved an automobile accident wherein the plaintiff's driver admitted a set of facts that conclusively established a violation of the state law of Utah and those facts were the direct and proximate cause of the accident, and created contributory negligence, as a matter of law, and we are at a loss to understand why counsel for appellant cites this case.

The case of *Crescent Manufacturing Company v. Hansen,* 24 Pac. (2d) 604, being the next case cited by appellant, is more favorable to our side of the case, and might be cited to uphold the judgment. The fourth syllabus reads:

> "4. Appeal and error, key 979(1).
>
> New Trial key 70.
>
> Whether new trial should be granted for insufficiency of evidence is addressed to trial court's discretion, *and ruling will not be disturbed except for manifest abuse."* (Emphasis ours.)

And syllabus number five reads:

> "5. Trial key 139(1).
>
> Whether evidence satisfies legal standards as to degree of proof is for jury in first instance and trial court in final instance."

And the only part of said opinion that casts any favorable aspect for the appellant is found in the following wording on page 606:

> "There is a clear distinction between the powers and duties of an appellate court and those of a trial court respecting the determination of the question of the sufficiency of evidence to support a verdict or other decision of fact. Undoubtedly, an appellate court may set aside a verdict which is wholly unsupported by the evidence or which is so clearly against the evidence that it could not have been reached by any fair and intelligent man. *But the appellate court may not review the evidence merely to determine its preponderance or weight.* Whether or not a new trial should be granted because of insufficiency of the evidence is addressed to the sound discretion of the trial court, *and the ruling thereon will not be disturbed except for manifest abuse of discretion.* It is for the jury in the first instance, and for the trial court in the final instance, to say whether the evidence satisfies legal standards as to degree of proof." (Emphasis ours.)

Surely this case does not support the assertion in appellant's brief.

The next and last case cited, *Magnolia Petroleum Company v. Bell,* 55 S.W. (2d) 782, is another damage suit and no more in point than those cited above, but the first syllabus reads:

> "1. Appeal and error, key 930(1).
>
> Reviewing Court must view evidence and inferences therefrom *in light most favorable to prevailing party,* in determining whether there was evidence to support jury's finding." (Emphasis ours.)

It is the appellees' contention that they had established at the mouth of Mosquito Creek, a logging business where they had operated four years, and the appellant, Columbia Lumber Company had made a timber purchase farther up the creek, and that to successfully operate in an economical way, they needed the property of Agostino and Socha. Both of the men being quite old, and Agostino being at the scene alone, the Columbia Lumber Company sent their mill superintendent, Rowell, and another employee by the name of Lambert, and attempted to bluff their way in, on Mr. Agostino, who was then seventy-one years of age, a man with very little education, but determined to protect his rights, and when they tried to land and set up their equipment in the midst of his operation, he refused them that privilege, explaining to them that Mosquito Creek was only large enough for one operation, and that he had 250,000 more board feet of logs paid for, and his equipment was all there, and that if he allowed them to come in there, take over his log ponds, booms, and rafting grounds, that he could not work his timber, and refused them entrance, which he had a perfect right to do. They went away and returned and made another attempt to get him to let them in. At that time, a discussion took place con-

cerning the Columbia Lumber Company buying Agostino and Socha out for $25,000.00. The testimony shows that they had that much invested in their machinery, equipment, buildings, and tools, and also had paid for an additional timber permit; justifying the cutting of 250,000 board feet. The evidence shows that Lambert and Rowell then communicated with Mr. Morgan, the president of the Columbia Lumber Company, the facts concerning the sale and purchase of the equipment of Agostino and Socha; and that Morgan sent a telegram to Ted Rowell, or Mr. Lambert, for the purpose of it being shown to Mr. Agostino, to the effect that he would be up and settle with them on the 10th of April, following. Of course, there was some contradiction of this evidence as to the exact content of the telegram. The jury had a right to believe the plaintiffs' contention of what the telegram said, and it was up to the defendant to present the telegram and it failed to produce it, to show a different set of facts. The natural inference is that the telegram would have corroborated the testimony of Agostino, or the Columbia Lumber Company would have produced it in Court as the undisputed evidence is, that the telegram was shown to Agostino and was read to him, and was then taken back by Ted Rowell, the superintendent for the defendant company. Taking the most favorable evidence on the plaintiffs' side, and eliminating the most unfavorable evidence to the contrary, which is the rule adopted in cases similar to this, then you have a sale and delivery to the defendant, who took all that the plaintiffs had to sell.

The Columbia Lumber Company received exactly what it wanted; it took over the exclusive operations; it took everything that the plaintiffs had; it cut their timber; it used their log pond; their roads; and even used the caterpillars to some extent at least; took possession of the buildings, and still had them during the trial, and were still operating there. We can't understand appellant's theory of the case; to follow it, one would have to indulge in the most extreme imagination, utterly disregard the evidence, and merely take the fantastic conclusions drawn by the attorneys for the appellant.

Applying the general rule of evidence as decided by this Honorable Court, in the case of *Inland Power & Light Co. v. Grieger, et al.,* 91 Fed. (2d) 811, the second syllabus reads:

> "Appeal and error key 931(1), 989
>
> In determining whether evidence supported judgment, Circuit Court of Appeals would consider evidence most favorable to appellees, with every inference of fact that might be drawn therefrom."

and from the body of the opinion on page 813, we quote:

> "In considering the evidence, we must consider only that which is most favorable to appellees, with every inference of fact that might be drawn from it. Maryland Casualty Co. v. Jones, 279 U.S. 792, 795, 49 S. Ct. 484, 73 L.Ed. 960."

This case is not only supported by those cited therein, but is also supported by a decision of the Seventh

Circuit, *McHale v. Hull,* 16 Fed. (2d) 781, and the third syllabus reads:

> "3. *Appeal and error key 989—Finding prevails on appeal, if there is any evidence to support it.*
>
> The only inquiry on review of finding for insufficiency of evidence is whether there is any evidence to support it."

In 1905, the Fourth Circuit Court of Appeals said in the case of *J. W. Bishop Co. v. Shelhorse,* 141 Fed. 643, quoting from the last part of the opinion on page 648:

> "4. Upon the whole case, we cannot perceive that the plaintiff in error was in any manner prejudiced by any of the rulings of the court below, in the trial of this case. As was said by Mr. Justice Lamar in Aetna Life Insurance Co. v. Ward, 140 U.S. 76, 91, 11 Sup. Ct. 720, 35 L. Ed. 371:
>
> '*It may be that, if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of the exceptions taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusal to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was property admitted*'—citing *Minor v. Tillotson,* 2 How. 392, 393, 11 L. Ed. 312; *Keller's Lessee v. Eckert,* 4 How. 289, 11 L. Ed. 979; *Dirst v. Morris,* 14 Wall. 484, 490, 20 L. Ed. 722; *Prentice v.*

Zane, 8 How. 470, 485, 12 L. Ed. 1160; *Wilson v. Everett,* 139 U.S. 616, 11 Sup. Ct. 664, 35 L. Ed. 286."

In the case of *Fidelity and Casualty Co. of N. Y. v. Howe,* consolidated with *National Life Ass'n of Des Moines, Iowa v. Same,* 38 Fed. (2d) 741, syllabus one reads:

"1. *Appeal and error key 989—On Question of taking case from jury, reviewing court is concerned only with plaintiff's proof.*

On question of taking issue from jury, reviewing court is concerned with plaintiff's proofs, and not with countervailing proofs of defendants."

In a very recent case, *McGogney et ux. v. Mutual Life Ins. Co. of N. Y.,* 103 Fed. (2d) 649, the second syllabus reads:

"2. *Appeal and error key 989*

On appeal from judgment on directed verdict for defendant, Circuit Court of Appeals must determine *only whether evidence, with all legimate inferences therefrom, fairly tended to support plaintiff's contention, and exclude all conflicting evidence or inferences."* (Emphasis ours.)

We believe this to be the universal rule, and the plaintiffs in the case at bar had something the defendant wanted; they made the defendant a price; the defendant accepted what plaintiffs had, but failed to pay for it, and the only controversy that ever arose was the price, and the defendant's contention that it did not accept the offer was clearly brought before the jury

with proper instructions and it has no right to dispute its liability here. And, since the jury was extremely conservative, as to its extent of finding for the plaintiffs, as to the amount, as set forth in its verdict, and the trial Court, in our humble opinion, had ample opportunity to hear the evidence, see all of the witnesses, hear all arguments, and in our opinion, correctly overruled the appellant's motion for an instructed verdict, and for a new trial, and is amply sustained by the evidence and the law.

II.

IN ANSWER TO THE SECOND ASSIGNMENT OF ERROR, AGAIN COUNSEL FOR APPELLANT HAS OVERLOOKED THE EVIDENCE OF THE PLAINTIFFS, AND RELIES UPON THE EVIDENCE OF THE DEFENDANT, AND RUNS CONTRARY TO THE RULE STATED AND SUPPORTED BY CASES IN ANSWER TO ASSIGNMENT ONE.

We will not again quote the testimony, because we are confident the Court has it well in mind, and for purposes of brevity, we will omit repeating; but, it is imperative that we call your attention to the fact that the log pond of the plaintiffs was as much a part of their equipment for operating, as the caterpillars, roads, cables, houses and mill. It is quite apparent from the evidence that without the log pond, the operation would not have been a success.

The undisputed evidence was, that the log pond was dry at low tides, and Agostino testified there was about ten feet of water in it at high tide, and Lambert testified to about eight feet, stated that it was nice

rafting water. They each and all described the hand setting of the pilings there surrounding the pond. It was testified that logs were fastened between the pilings, that would rise and fall with the tide. It had to make a complete inclosure to hold the logs inside. The boom logs were equipped with chains at the end, and were fastened together.

Socha testified that the pond was cleared of stumps; that they were working on it for a long period of time, setting the pilings, and clearing the ground for a logging pond, even testified to the number of men, and the length of time worked. (Tr. 269-270.) Counsel for appellant seems to have missed the testimony that shows this was a small pond up Mosquito Creek some distance from the seashore, and that the pond went dry at low tide. At high tide the water came up Mosquito Creek and flooded the pond. Attorneys for appellant overlooked the evidence showing that the scow first landed at Agostino's place, and after Agostino surrendered possession to the defendant company, the scow was moved farther up into the logging pond, and landed there. And the pond was actually used in the logging industry of the defendant company, and some more pilings were driven in, in another location, or at least a temporary change in the lines of the pond, but this all came about after possession was surrendered to the Columbia Lumber Company. The testimony is clear and undisputed that the appellees, Agostino and Socha, had actual and complete possession of not only the log pond but also the surrounding territory at the mouth of Mosquito Creek by reason

of the Government issuing to them the timber cutting permits over a period of four years, just prior to March 1948. (Tr. 119-125.)

We have always been of the opinion, that instructions are considered as a whole, and that so long as the entire instructions do, with reasonable accuracy, state the law correctly, the fact that a single sentence in the instruction standing alone might be confusing is immaterial. We have carefully read instructions 5, 5-a, and 6, and in our humble opinion, they state the law more favorably to the Columbia Lumber Company, than it was entitled to, or at least, as favorably as the defendant company could possibly ask for; and states more favorably to the Columbia Lumber Company than the cases cited by its attorneys here. Instruction 5 that appellant is complaining of, has this sentence in it:

> "and likewise, the defendant had and has the lawful right to use unoccupied portions of the public domain, and unoccupied tide land, and possession of such area by the defendant does not constitute any evidence of sale."

Then the following sentence in instruction five should be noted:

> "It should be noted that as respects tide land, actual possession is necessary to establish superior right. Without actual possession, all persons enjoy equal right to use thereof."

In the first place, the appellant has cited no cases in its brief holding to the contrary, and, in fact, the

cases cited would each justify a much stronger instruction in favor of the plaintiffs in the Court below.

It is quite apparent from the reading of the transcript, that there was no serious objection stated to instruction five. However, there was an exception to certain portions of instruction five. (Please note Tr. 637.)

The first case cited by appellant, to-wit: *Juneau Ferry Co. v. Alaska Steamship Co.*, 1 Alaska 533, could not possibly be considered as supporting the contention of the appellant. In that case, Judge Brown used these words:

> "If they have possession, it must be such character of possession as keeps all others out, and such as constitutes actual occupancy by themselves."

In the case at bar, the Columbia Lumber Company attempted to land in the midst of Agostino and Socha's operations, and were denied the right to land. The mill superintendent, Rowell, and Lambert recognized Agostino and Socha's right there, and made no further effort to land until, as Lambert put it, he understood that Agostino was selling everything to the Columbia Lumber Company, and it is quite apparent, at least, that Agostino, being a man of very limited education and quite an old gentleman, thought that the words, "I will be down and settle with them" meant that the Columbia Lumber Company had agreed to buy his property and interpreted the act of Rowell and Lambert in showing him Morgan's telegram and the other things, that took place, that the Columbia Lumber

Company was buying him and Socha out for $25,-000.00. This is so forcibly brought home by the fact that he turned over possession of everything to Lambert and Rowell, who were both working for the Columbia Lumber Company at the time and possession was taken by the Columbia Lumber Company of everything they wanted. The instruction five is not affected in any way by the *Juneau Ferry* case.

This Honorable Court in modifying the *Juneau Ferry* case, 2 Alaska Fed. Rep. 59, and 121 Fed. 356, never in any way made a statement of law contrary in the slightest degree to the instruction given by the Honorable Anthony J. Dimond, which instruction is the one objected to here.

The case of *Haines Wharf Co. v. Dalton, et ux.,* 1 Alaska 555, merely holds that persons who have abandoned one entire boundary line, leaving the limit of their claim open, indefinite and undetermined, are limited in their possessory claims to lands actually occupied. We can't understand where that case in any way holds against the instruction given. It seems to support it in every way, and we see no reason to comment further on that.

The next case referred to, of *Gordon v. Ross Higgins Co.,* 162 Fed. 637, is an opinion from this Honorable Court, and involves an abandonment of a town lot in Fairbanks, from 1903 until 1906, and the very quotation set forth in the appellant's brief on page 25, shows that it has nothing whatsoever to do with the case before the Court, or with the instruction complained of.

The next case cited, *Courtney v. Turner,* 12 Nev. 343, is very favorable to the appellees, especially the following portion:

> "actual possession of land consists of subjecting it to the will and dominion of the occupant, and must be evidenced by those things which are essential to its beneficial use."

Agostino and Socha unquestionably had possession of this log pond from the time they started building it and for the following four years, at least, and until they turned it over to the Columbia Lumber Company.

The next case cited, *Crawford v. Burr,* 2 Alaska 33, is so far from the question involved, we feel that a casual reference is sufficient. In that case, there was a military reservation at Valdez, which was abandoned in 1902. The plaintiff was in possession of a stable thereon, but without any fixed boundary, without any other claim or right to any fixed portion of the ground. He abandoned it, the brush grew up over the barn, and there was no fence of any kind, left standing, no markings or monuments of any kind, and the land was located by townsite claimants. The Court held that the plaintiff was entitled only to the land occupied by his stable, which was all he had under his control, and surely could have no bearing on the case at bar, and nowhere does Judge Wickersham indicate a single phrase that would support appellant's contention with relation to its objection to instruction five.

There are many cases in Alaska that are much more in point in this argument than those cited by appellant, especially the following:

Young v. Fitzgerald, 4 Alaska 52, the only syllabus reads, as follows:

> "1. Public Lands (p. 31*)—Occupancy—Indians—Tidelands. On May 17, 1884, and for many years prior thereto, one Yach-goos, an Indian, was in possession of a small tract of upland abutting on the seashore near Juneau, Alaska. He had cleared the rocks from a narrow strip of the land, giving him access from the sea to his home, and on this cleared strip of tidelands set stakes, to which he moored his canoes. In 1902 plaintiff entered upon the tideland strip and set piles, without the Indian's permission, and thereafter claimed the possessory title to the strip for wharf purposes. In 1908 Yach-goos conveyed his possessory rights by deed to Mrs. Fitzgerald, an Indian woman, who entered into possession. Plaintiff brought suit praying for an injunction to prevent defendants from trespassing upon the premises. *Held,* under Act May 17, 1884, c. 53, 23 Stat. 24, the Indian occupancy could not be disturbed by the plaintiff, and injunction denied."

Other cases supporting the theory of law expressed in the instruction five are:

> *Decker v. Pacific Coast SS. Co.,* 164 Fed. 974;
> *McKloskey v. Pacific Coast Co.,* 160 Fed. 794.

In 3 Alaska 77, the sixth syllabus reads:

> "6. Navigable waters (p. 39*)—Public Lands—Tide Lands. A trespasser *held* to have no right

to go upon tide land in front of the upland owner and erect structures or buildings which interrupt or interferes with the right of the upland owners' access to deep water in front of his upland property, and injunction issued to prevent the trespass."

And from the body of the opinion on page 88, we quote:

"The evidence on the part of the plaintiff discloses a series of actions on its part and the part of its grantees which completely and entirely refutes and contradicts any idea of abandonment or forfeiture of their rights as upland holders. The court is of the opinion that, while the plaintiff has in law no title to the tide lands, that remaining in the United States for the benefit of the future state, *it has a right of uninterrupted access thereover to the deep water, and that the defendant had no right or warrant, under the law, to go upon the land for the purpose of the erection of any structure or building which would interrupt or interfere with this right of the plaintiff,* that he was therefore wrongfully on the land, and that the plaintiff is entitled to the relief for which it prays in its complaint." (Emphasis ours.)

A close observation of what took place in the trial of this case as set forth in the printed transcript at pages 651, 652, and 653 shows that the Court made some changes in the instructions to please the defendant, and on page 651, you will find the following wording:

The Court. I am going to follow counsel's suggestion and insert "or some part thereof", on page 3 before defendant's counsel take their exceptions.

Mr. Davis. That will be "* * * then accepted and received said——"

The Court. "or some part thereof".

Counsel for defendant may take exceptions.

Mr. Boochever. The only one is in regard to Instruction 5 on page 2 where it states "Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings." We think that after that there should be added "and that the superior right established by such position extends only to such structural improvements and not to unoccupied portions of tide lands" or some such similar provision so that they will understand that a few pilings in a tideland pond does not give exclusive right to the whole pond but only to the portions occupied by the pilings.

The Court. Exceptions will be noted. Now, as to the instruction requested, I have marked each of them refused except as covered by instructions given and exception taken and I have signed it and these instructions will be filed now with the clerk and may be considered as incorporated in the reporter's notes at this time, or as immediately following the taking of exceptions originally whichever counsel desires. (671)

* * * * * * *

Mr. Bell. Either way.

Mr. Davis. Entirely satisfactory with me.

Mr. Bell. Entirely satisfactory with us.

Mr. Boochever. Your Honor, what is your position in regard to a sealed verdict?

The Court. Well, if counsel stipulate there will be a sealed verdict. It is up to counsel. I do not feel that I have the right to impose a sealed verdict unless counsel agree to it.

Mr. Boochever. I frankly would rather not have one because I could leave by seven tomorrow, but I do not want to hold my personal desires in opposition with the Court.

The Court. It doesn't bother me at all. I am a wakeful individual.

Mr. Davis. So far as I am concerned I would prefer a sealed verdict if everybody else is agreeable.

Mr. Bell. I would too.

The Court. We will not have it unless everyone stipulates.

Mr. Boochever. We will stipulate.

Mr. Bell. We will stipulate.

which clearly shows that no one took an exception to instruction 5, but Mr. Boochever states: "We think that after that there should be added 'and that the superior right established by such position extends only to such structural improvements.'"

It is quite apparent from the record that the instructions as given here accepted by Mr. Davis, one of the counsel for defendant, and passed by Mr. Boochever, the other counsel for defendant, with merely a suggestion that he thought it should be followed with the words: "and that the superior right

established by such position extends only to such structural improvements".

We have carefully analyzed the decisions affecting Alaska, and apparently the Honorable Anthony J. Dimond, stated the law exactly as it should be stated in Instruction 5.

III.

THE DISTRICT COURT ERRED BY REFUSING TO INSTRUCT THE JURY THAT KENNETH LAMBERT WAS AN INDEPENDENT CONTRACTOR AT ALL TIMES AFTER APRIL 1, 1948 SINCE ALL THE ORAL EVIDENCE AND THE WRITTEN CONTRACT EXECUTED BETWEEN THE APPELLANT AND LAMBERT COULD ONLY BE CONSTRUED AS ESTABLISHING AN INDEPENDENT CONTRACT RELATIONSHIP.

In answer to the third assignment of error, it is apparent from the testimony that it made no difference whether Lambert was an independent contractor after April 1, 1948, until he left about the 14th of July, at which time some other man took over for the Columbia Lumber Co., and continued cutting timber and using the plaintiffs' roads, log ponds, buildings, improvements, machinery, and equipment, and so far as the record shows, were still using them at the time of the trial of this case. The undisputed testimony that Lambert & Howell were both employees of the Columbia Lumber Co. in March when they landed and took over plaintiffs' property, and the question as to whether Lambert became an independent contractor as of April 1, and so continued until approximately July 14, could not possibly make any difference as to

the obligation of the Columbia Lumber Co. and still, so far as we know, is held by them. It should be remembered that during the trial of the case, that the Columbia Lumber Company had charge and possession of the cook house and the bunk house, and Mr. Hooper, one of the employees of the Columbia Lumber Co. testified that he was still living in it at the time of the trial. It should also be borne in mind, that the timber that had been paid for by the plaintiffs, northwest of the large house and camp, was all cut and the logs went to the Columbia Lumber Company. Therefore, it is absolutely immaterial whether Lambert was an independent contractor after April 1, 1948, until July 14, and it could make no difference because at the time the Columbia Lumber Company, acting through its mill superintendent, Mr. Rowell, and a then employed man, Mr. Lambert, did take possession of everything with the consent of Mr. Agostino, who positively testified and no one contradicted his testimony, that he turned everything over to Mr. Lambert and Mr. Rowell for the Columbia Lumber Company, after they showed him the telegram and told him that Mr. Morgan would be up the 10th of April to settle with him, and there was never a single person who testified to the contrary. It must be borne in mind that the evidence conclusively shows that Lambert and Rowell were both acting as employees and agents of the Columbia Lumber Company all during the month of March, 1948, and in their trips to Barry Arm, and back to communicate with Mr. Morgan, were all made at the instance and request of Mr. Morgan, who was president

of the Columbia Lumber Company, and all of their acts were guided by instructions from Mr. Morgan. Whether or not Mr. Morgan conceived an idea that he could deceive these two old gentlemen, Agostino & Socha, because of their lack of education and due to their being quite old, and did intend to get possession of the mouth of Mosquito Creek, the log pond, the roads, buildings, and all of their logging operations without ever becoming obligated to pay therefor, or not, nevertheless, Agostino offered to sell and give possession, and Mr. Morgan, the president of the Columbia Lumber Company, either fully intended to buy them out, or attempted to cheat them out of their assets, and it would be nicer to say of Mr. Morgan, that he intended to buy them out, and pay them the reasonable value of their holdings, than it would be to say that he attempted to cheat and defraud them. And, assuming that either was true, then Mr. Morgan and his employees, Ted Rowell, and Blackie Lambert, did get exactly what they wanted, they had to have the mouth of Mosquito Creek, the log pond, the equipment, including the roads, to get to a large quantity of timber they had purchased farther up the creek; and whether or not the Court refused to give an instruction offered by the defendant as to Blackie Lambert's being an independent contractor after the first of April, was as immaterial as the law of arson, as far as this case is concerned. And, you will note that after the instructions were read and the Court called us up to the bench, to see if we wanted any exceptions, the only exception taken was by Mr.

Boochever as above set forth, and to raise a back-hand question of this kind for the first time, in the Appellate Court, would be extremely unjust to the trial judge.

IV.

IN ANSWER TO THE FOURTH ASSIGNMENT OF ERROR THAT THE ALLEGED ORAL CONTRACT OF SALE ON MARCH 24, 1948, WAS NOT ENFORCEABLE AS FALLING WITHIN THE PROVISIONS OF THE STATUTE OF FRAUDS, ACLA 1949, SECTION 29-1-12, SINCE THERE WAS NO SUCH ACCEPTANCE OR RECEIPT AS TO TAKE THE CONTRACT OUT OF THE STATUTE, AND THE COURT'S INSTRUCTION NO. 4 WAS ERRONEOUS IN STATING UNDER THE CIRCUMSTANCES OF THIS CASE THAT "AN ORAL CONTRACT FOR THE SALE OF PERSONAL PROPERTY MAY IN LAW, IF PROVED, BE JUST AS VALID AND ENFORCEABLE AS THOUGH IT WERE WRITTEN".

In our humble opinion this assignment is without merit, since the evidence all shows actual delivery and the complete taking of possession of everything by the defendant company, and there is no better settled rule of law than that an oral contract for the sale of personal property, may in law if proved, be just as valid and enforceable as though it were written. This is an elementary rule of law, and we would not want to insult the intelligence of this high Court by citing authorities on that statement, as the law cited by appellant is apparently based upon an erroneous assumption, that no part of the property sold was ever delivered. Agostino testified positively, and so did Lambert, that after the telegram from Mr. Morgan was shown to him, and after the conversation there on the bank

of Mosquito Creek concerning the fact "that Mr. Morgan would be up and settle with him on the 10th of April", that Mr. Agostino immediately turned over everything to the Columbia Lumber Company. That is Agostino's testimony, and the jury had a perfect right to believe it, if it cared to, and especially so, when there were only technical denials of the actual delivery and an admission of Lambert that he was given a free hand to go where he cared to go, to use anything he wanted to use, and Agostino testified, and the matter stood undisputed, that the tools and things in the garage were used from that day on; the defendant located its camp there; started putting its equipment in readiness for operation, when the snow went out, it put its logs in the log pond from the very instant it started cutting timber. It is apparent, however, that here was some kind of a scheme by the defendant company, or we might say, a delayed action on its part, until it was safely established in the midst of the operations of Agostino and Socha, but there never was a time, and not a word of evidence to indicate that Agostino interfered in the least with the Columbia Lumber Company's possession of everything at Barry Arm. Therefore, the cases cited by the appellant have no earthly application to the case at bar, and if Agostino's testimony was believed which the jury had a perfect right to do, then there was a sale and delivery, an absolute and complete delivery, unconditional and unequivocal, and just how the defendant, Columbia Lumber Company, handled its acceptance of the delivery makes no difference, because

it did accept, retain, and use the roads, the log pond, the buildings, the site for its own camp, the garage, tools, extra supplies, and anything it wanted. Therefore, we submit, that the fourth assignment of error is directly contrary to the law and the evidence in the case, and the Court's instruction could not be anything but right under the evidence introduced.

V.

AS TO THE FIFTH ASSIGNMENT OF ERROR, AS FOLLOWS, TO-WIT: ON OR ABOUT JUNE 29, 1948, THE PARTIES HERETO ENTERED INTO AN AGREEMENT FOR THE SALE OF THE PROPERTY IN QUESTION. SINCE THIS AGREEMENT WAS REDUCED TO WRITING, SIGNED BY APPELLEES, AND SINCE APPELLANT TOOK POSSESSION OF THE PROPERTY UNDER THE TERMS OF THIS AGREEMENT, THE COURT ERRED IN PERMITTING EVIDENCE TO BE INTRODUCED OF AN ALLEGED PRIOR INCONSISTENT ORAL AGREEMENT INVOLVING THE SAME TRANSACTION.

The evidence throughout the case shows that there was an honest, conscientious effort on the part of Mr. Agostino, to compromise and settle the dispute with the defendant, Columbia Lumber Company. He tried diligently to collect the money that he had coming, and it must be borne in mind that he never at any time went back into the possession of the equipment and operations at Barry Arm, but on the contrary, the Columbia Lumber Company had everything it wanted, and was operating at full blast. The only trouble that Agostino & Socha had was trying to locate Thomas Morgan, the president of the Columbia Lumber Company, and make him pay off. Mr. Morgan, having ex-

actly what he wanted, was as elusive as the man in the proverbial invisible suit. Finally, Mr. Butcher did get him located by telephone, and did get him in Anchorage. Wherein, he did agree to pay $10,000.00 to the plaintiffs, but Mr. Butcher prepared the contract, and Agostino signed it, and it was sent to Mr. Morgan, but so far as the evidence shows, it was never signed by Mr. Morgan until after this suit was filed and Mr. Agostino testified positively that he never did see the original, or a copy of that contract, that was signed by the Columbia Lumber Company, acting by and through Thomas Morgan, or anyone else, until on the witness stand in the trial of this case. This was only an offer of compromise which was made in good faith on the part of Agostino, and dodged and evaded by the Columbia Lumber Company, acting through its president, Thomas Morgan, and I imagine the jury did not believe Thomas Morgan when he evasively testified concerning the signing of this contract. When he couldn't remember just when he signed it, or under what circumstances he signed it, and after all, admitted that he had never paid a cent under the terms of said contract and had done nothing to comply therewith. Therefore, there was no written contract that became binding on Agostino as there was no signing and executing of it by the defendant, Columbia Lumber Company; and no delivery thereof to Agostino; none of the payments made; none of the terms mentioned in the contract, were ever met or complied with by the defendant, Columbia Lumber Company. Possibly the jury believed, which they had

a perfect right to do under the evidence, that the signing of this contract was an after-thought on the part of the defendant, after this suit was at issue. This is especially true since the answer sworn to by this same Thomas Morgan on the 2nd day of June 1949, and especially page 23 Tr., states that, he executed this contract as president for the Columbia Lumber Company and left certain checks with J. L. McCarrey, Jr., of Anchorage, Alaska, on the *10th day of July, 1948.* Then the exhibit introduced shows that it was signed on the 29th day of July, 1948, by Bruno Agostino, but when it was signed by the Columbia Lumber Company, does not show on the exhibit. All of the evidence is to the effect that it was first executed by Bruno Agostino and acknowledged before Harold J. Butcher, a Notary Public. This is borne out by the fact that the acknowledgment on the exhibit attached to the defendant's answer on which the case was tried shows an acknowledgment on the 29th day of July, 1948, by Bruno Agostino, but the instrument itself shows no acknowledgment at any time *by Thomas Morgan.* (Tr. 35.) Then attached to that instrument is a letter that Mr. Morgan claims to have written to Mr. Harold J. Butcher under date of *July 19,* 1948, and signed by Thomas Morgan, President, Columbia Lumber Company in which Mr. Morgan states: "I have signed a check in the sum of $3,300.00, and left it with Mr. C. D. Summers". This is, of course, specifically contrary to the answer signed and sworn to by Mr. Morgan, that he left checks with Mr. McCarrey in the amount of $5,000.00, on the 10th of July, 1948.

In the letter that Mr. Morgan had introduced in evidence, as above-described which is found at page 36 Tr., wherein he states: "I am sure you would not expect me to *sign* it without a definite understanding as to what the $10,000.00 is going to purchase", he there again contradicts his sworn answer in which he stated that he did sign and execute it on behalf of the Columbia Lumber Company on the 10th of July, 1948, and then in his testimony (Tr. 387), he testified that on July 10th or 11th, while in Anchorage and before he went to Whittier he signed the contract and the checks and left them with Mr. McCarrey, his attorney. Yet, no one ever, at any time before the trial ever delivered a signed original or a signed copy, of the contract to either Agostino or Socha, and the first time either ever saw it was during the trial.

Maybe the jury could see by the evidence that the overt act of the defendant clearly shows a scheme and an effort on the part of the Columbia Lumber Company to get what it wanted, and to pay nothing to the plaintiffs. Under the circumstances set forth in the record, we sincerely contend that there is no merit in the fifth assignment of error.

VI.

AS TO THE SIXTH ASSIGNMENT OF ERROR, WHICH IS AS FOLLOWS: THE COURT ERRED IN PERMITTING TESTIMONY OVER APPELLANT'S OBJECTION AS TO THE CONTENTS OF AN ALLEGED TELEGRAM PURPORTING TO GRANT APPELLEES A CONTINUATION OF THEIR TIMBER PERMIT.

In answer to the above assignment, we will set forth in detail, the testimony concerning this telegram, which will show conclusively to this Honorable Court, that there were no objections made, and that the evidence originally introduced went in without objections (Tr. 223):

"Q. Did Mr. Agostino show you any papers or anything at that time showing that he did have a timber purchase there?

A. Yes, he showed us a telegram he received from the Forest Service.

Q. Do you remember whether or not he gave you that telegram to take back with you?

A. Yes.

Q. And who did you give the telegram to?

A. Mr. Rowell has that telegram in his possession at that time.

Q. Can you remember the contents of that telegram?

A. Well, not word for word, it was a telegram from the Juneau office stating that he had a continuation of his timber sale of 250,000.

Q. Then what did you do with the boats at the time you and Ted were together there, where did you go after this conversation? (130)

A. We went back to Whittier."

Then later, at the time Mr. Lambert was testifying on redirect examination, the following took place; first we call your attention to an objection stated by Mr. Boochever (Tr. 582):

"Mr. Boochever. *Object to as improper rebuttal testimony.*

The Court. Objection is sustained.

Q. (by Mr. Ross). Do you recall seeing any timber at all in between a site where Agostino and Socha had cut out trees on the east side of Mosquito Creek at Barry Arm Camp and the place where you started cutting timber for Columbia Lumber Company?

Mr. Boochever. Object to that question for the same reason and also for the further reason it is a leading question. (534)

The Court. Objection is sustained.

Q. (by Mr. Ross). I will ask you then, Mr. Lambert, was there any merchandisable timber standing between Agostino's old cutting and where Columbia Lumber Company starting cutting?

Mr. Boochever. Same objection.

The Court. Same ruling. The matter was covered fully in examination in chief.

Q. (by Mr. Ross). Mr. Lambert, do you recall seeing a telegram in the office of the Columbia Lumber Company at Whittier in the spring about March or April, sometime in the spring of 1948, addressed to Bruno Agostino?

Mr. Boochever. Object to that question for the same reason, Your Honor.

The Court. I do not recall whether that question was asked or not, and therefore the objection is overruled.

Q. (by Mr. Ross). Answer?

A. I saw that telegram that Mr. Agostino gave me, that I took to the Columbia Lumber Company office and I left it there.

Q. Mr. Agostino gave you?

A. Yes.

Q. Where did Mr. Agostino give it to you?

A. At Barry Arm. (535)

Q. Do you know about what time that was?

A. It was sometime in March.

Q. Was it 1948?

A. 1948, yes.

Q. Who was the telegram from, Mr. Lambert?

A. From the Forest Service in Juneau.

Q. Did you read the telegram?

A. Yes.

Q. Will you state to the jury what was in that telegram?

Mr. Boochever. Object to that as hearsay, Your Honor.

The Court. Telegram must be accounted for before any secondary evidence can be offered upon it.

Mr. Boochever. But the secondary evidence is something which someone in The Forest Service sent to Mr. Agostino. It is irrelevant and hearsay anyway whether it is in writing or oral.

The Court. Official communication upon the subject—upon anything concerning the subject of the

action I think would be admissible. The objection is overruled.

Q. (by Mr. Ross). Go ahead and answer?

A. Well, the——

The Court. Don't answer. There is no proof as to where the telegram is. Mr. Agostino is here.

Q. (by Mr. Ross). Do you know what became of the telegram that was delivered to Bruno Agostino?

A. The last I saw of it was in the Columbia Lumber Company office at Whittier.

Mr. Ross. I ask you, counsel, for this telegram.

Mr. Boochever. I wish to state we have asked for all telegrams and all communications about this matter from Whittier and we have never received or been able to obtain any copy of such a telegram or any other telegram which is bearing on this case.

Q. (by Mr. Ross). Do you know where that telegram is now, Mr. Lambert?

A. No.

Q. Did you read that telegram?

A. Yes.

Q. State to the jury what was in that telegram?

A. Well, it was informing Mr. Agostino that he had a continuation of his timber sale and the exact wording of it, I can't remember but that was the text of it.

Q. It was a continuation of the timber sale?

A. Yes.

Q. You mean at Barry Arm?

A. At Barry Arm.

Q. And that was in March of 1948, I believe you say?

A. Yes. (537)"

It is quite apparent that the objection made by Mr. Boochever, that it was improper rebuttal testimony, was never again repeated after Mr. Ross demanded counsel for the Columbia Lumber Company to produce the telegram from their files. It will be noted by the last five questions and answers, that this testimony was never objected to and especially when the evidence was first put in as shown by Tr. 223; no objection whatever was made, and the evidence was all in, and all that took place later was perfectly harmless, and the only reason for objecting to it, was that it was improper rebuttal testimony, and if it was improper rebuttal, and the Court had erred in admitting it, it was a perfectly harmless error, and there would be no reason for reversing the law suit, since the testimony that was objected to by Mr. Boochever, was practically all excluded by the Court, and the last five questions and answers were the only parts of the testimony of this witness with reference to the contents of the telegram that was given after any objections had formerly been made, and these last five questions were not objected to, but were apparently thought to be competent by the attorneys for the defendant and in truth and in fact, they were competent. The evidence all was to the effect that the defendant had the telegram in its possession, and that Mr. Ross, one of the counsel for the plaintiffs, requested Mr. Boochever of counsel for the defendant, to produce

the telegram, and there was no showing made, or attempted to be made, that the telegram was not in the possession of the defendant, to contradict the positive testimony of the witness, Kenneth D. Lambert, that the telegram was last seen in the office files of the defendant company at Whittier. Therefore, the evidence of the contents was admissible, since the lack of ability to produce the best evidence, to-wit: the telegram itself, was clearly accounted for by the fact that the defendant itself had the original telegram and failed, neglected, and refused to furnish it upon demand having been made to produce it, which demand was made several days since the first evidence of Mr. Lambert went in (Tr. 223); therefore, the witness had a perfect right to testify to the contents thereof.

And, this is especially true since the same testimony, or practically the same had gone in without objections. (Tr. 223.)

We think this rule to be so well settled that we will quote only from 20 *Am. Jur.* 414:

> "414. *Telegrams*—Where an issue involves facts stated in a telegram, under the best evidence rule the original telegram, if available, should be produced as proof of the contents of the message; secondary evidence of such contents is admissible only when the original telegram cannot be produced."

However, there was no objection made by defendant that is sufficient to raise this question on, and since it was not timely and properly raised in the trial Court, it should not be considered here.

VII.

IN ANSWER TO ASSIGNMENT OF ERROR SEVEN, AS FOLLOWS: THE COURT ERRED IN ALLOWING APPELLEES FURTHER TO AMEND THEIR AMENDED COMPLAINT AFTER APPELLEES HAD RESTED SINCE THE SECOND AMENDED COMPLAINT WAS BASED ON A SUBSTANTIALLY CHANGED CAUSE OF ACTION.

The amended complaint as shown (Tr. 2), is in two causes of action. While the second cause of action is shown in the printed transcript, in truth and in fact, the Court made an order striking plaintiffs' second cause of action, on a motion filed by the defendant. An exception was taken by the plaintiffs to the ruling of the Court, and the case went to trial with only the first cause of action and the third cause of action. The first cause of action being based upon an oral contract for the sale and purchase of the plaintiffs' property for $25,000.00, which in our humble opinion, was sufficiently proved in the trial of the case. The third cause of action in the trial Court's opinion, was not quite as it should be as a *quantum valebant* cause of action, and therefore, ordered the plaintiffs to file a second amended complaint which is found at page 12 of transcript, and is purely *quantum valebant.* It should be noted that the second amended complaint merely follows the proof that was put in without objections. These values were established by Lambert in practically every instance, and I think in all but the sawmill, which he declined to fix the value of, however, the value of the sawmill was fixed by several witnesses, including at least one of the defendant's witnesses, and the amended complaint was permitted to be filed to conform clearly to the evidence that went

in without objections. Plaintiffs' third cause of action in the original complaint was, in our humble opinion, sufficient as a *quantum meruit,* or *quantum valebant* allegation. It alleged that the defendant became indebted to the plaintiffs, became obligated and bound to pay them on or before the 10th day of April 1948, the sum of $25,000.00 on account of logging equipment, machinery, buildings, and rights to plaintiffs' timber permit, sold and delivered to the defendant by the plaintiffs at the defendant's request in the Third Judicial Division of the Territory of Alaska; which property the defendant accepted and now retains, and has failed, neglected, and refused to pay for the same, or any part thereof; that there is now due the plaintiffs from the defendant, the sum of $25,000.00, together with interest thereon at the rate of six per cent (6%) per annum from the 10th day of April, 1948.

However, we believe the trial Court, by allowing and directing the filing of the second amended complaint was absolutely correct, in that there was not a specific allegation in the third cause of action in the amended complaint as to the actual value of separate items and articles sold and delivered by the plaintiffs to the defendant, there being just a general inference as to the value of the property based upon the allegation of sale and delivery and an obligation to pay $25,000.00 Especially is this true, since the rules of Civil Procedure, and particularly Rule 15, subdivisions b and c, thereof would not only authorize and empower the Trial Judge to allow the trial amendments as made here, but seem to urge upon him

the necessity of allowing them. Subparagraphs b and c of Rule 15, are as follows:

"(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. *Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.* If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence." (Emphasis ours.)

"(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Unquestionably, the rule in all Federal Courts at the time of the trial of this case permitted amendments to the pleadings whenever justice would be better served, and the Trial Judge, sitting in the case at bar had

heard all of this evidence as to the values of each of the articles sold and delivered, and all of this evidence went in without objections, both plaintiffs and the defendant laboring under the conclusion that the evidence was correct and proper and was purely within the pleadings in the case.

The men of wisdom in adopting the rules of Federal Procedure were driving hard toward the point of eliminating technicalities of old, and arriving at a set of rules and procedure where justice could be speedily done and when they established Rule 61, "Harmless Error", they had in mind such matters as have been raised by counsel for appellant in this case. We take the privilege of quoting Rule 61 in our brief, as follows:

> "Rule 61. *Harmless Error.*
>
> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every state of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

It is too apparent for need of discussion, that the first cause of action set up in the amended complaint was based upon contract of sale for a specific price, and we believe that at the close of plaintiffs' testi-

mony, that we had proved cause of action number one sufficiently to go to the jury on it; however, the Trial Judge, in his wisdom, thought that it was necessary to proceed on a *quantum valebant* theory as the evidence established *quantum valebant,* or *quantum meruit,* sufficiently and did allow and direct the filing of an amended complaint. It should be borne in mind that the third cause of action set up in the amended complaint as it originally stood was based upon a sale and a delivery and might have been sufficient as it was, but due to the ruling of the Court, the second amended complaint was filed to make the pleading comply with the evidence that was then in, and had been introduced without objection, and the values of the articles were testified to by both plaintiffs and defendant, both on direct and cross-examination, therefore, the trial Court, was unquestionably correct in allowing and directing the filing of the second amended complaint.

VIII.

IN ANSWER TO THE EIGHTH ASSIGNMENT OF ERROR, WHICH IS SET UP BY APPELLANT, AS FOLLOWS: THE COURT ERRED IN DENYING APPELLANT'S MOTIONS TO STRIKE PORTIONS OF APPELLEES' SECOND AMENDED COMPLAINT AND MAKE MORE DEFINITE AND CERTAIN, AND TO STRIKE PORTIONS OF APPELLEES' REPLY, SINCE IMPROPER ALLEGATIONS HIGHLY PREJUDICIAL TO APPELLANT, WERE PERMITTED TO GO TO THE JURY BY VIRTUE OF THE COURT'S DENYING THESE MOTIONS.

We think it is sufficient to call the Court's attention to the fact that a long motion to make more definite and to strike filed by the defendant was never

presented to the Court and we call your attention specifically to the long-drawn-out answer and counter-claim filed by the defendant to the second amended complaint, commencing on page 18 of the transcript, and extending over to page 37, and the matters referred to in the plaintiffs' reply to this monstrosity, were the portions attacked by the motion, but we have carefully examined the record, and find that the docket is quite clear on the fact that the trial of this case started May 31, 1949, and on June 2, the defendant filed a motion to strike directed against the second amended complaint, which had been filed earlier on the same day, see date of filing (Tr. 16), and on the same day filed an answer and counter-claim, see filing date (Tr. 37), then on June 3, plaintiffs filed their reply; and on June 4, defendant filed a motion to strike portions of the reply, and the case continued on trial until June 8, 1949, at which time the verdict was rendered for the plaintiffs, and at no time in the docket is there the slightest indication that the defendant ever asked the Court to rule upon its motion to strike, but was apparently happy with events as they transpired. Therefore, it would be grossly unfair to ask this Appellate Court to pass, for the first time, on the defendant's motion to strike portions of the reply, when they should have been presented to the trial Court, if the defendant had any confidence in said motion, or felt that any prejudicial results might happen, or that its motion should be sustained. Then it should have called said motion for hearing before the trial Court. Appellees relying upon former decisions of this Court, will not, unless requested, by this

Court, further argue the justice of the motion to strike referred to in the eighth assignment of error, since the motion was never presented to the trial Court and was waived by the defendant, and should not be considered for the first time, on appeal.

CONCLUSION.

In conclusion, please permit us to humbly state, that due to the conduct of the defendant company, and especially due to the fact that it received more than dollar for dollar in actual value under the terms of its purchase, that this appeal is not taken in good faith, but is apparently for the purpose of further harassing and annoying this pair of old gentlemen, who are now traveling on the downward slope of life, and who have lost, so far as the evidence shows, their life savings to the Columbia Lumber Company, and were only able to induce a jury to render a judgment for them for a little more than half the actual value of the benefits taken by the defendant. And, in this conclusion, permit me to quote the Alaskan statute which authorizes and empowers the judge of the District Court to allow and assess in favor of the prevailing party, a reasonable attorney's fee, which statute is as follows:

> "55-11-51. *Compensation of Attorneys.* The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in main-

> taining the action or defense thereto, which allowances are termed costs. (C.L.A. 1913, p. 1341; C.L.A. 1933, p. 4061.)"

75 Fed. (2d) 692 holds:

> "what is a reasonable attorney's fee, is not a question for the jury, no evidence thereon is necessary". *Forno v. Coil,* C.C.A. 9, 1935, 75 Fed. (2d) 692, and later in the case of *Pilgrim v. Grant,* 9 Alaska 417.

We feel that the small fee of $250.00 allowed to the plaintiffs by the Trial Judge, should be raised to a sum commensurate with the many, many days of labor performed by plaintiffs' attorneys in this case, both in the trial Court and on this appeal.

We also feel that the trial Court was duty bound to allow plaintiffs interest on the amount found due by the Court wherein he deleted the interest. (Tr. 98.)

This was all raised on the cross-appeal of the appellees and is properly before the Court for consideration.

Dated, Anchorage, Alaska,
May 3, 1950.

Respectfully submitted,
BAILEY E. BELL,
HERMAN H. ROSS,
Attorneys for Appellees and Cross-Appellants, Bruno Agostino and Stanley Socha.

No. 12,393

IN THE

United States Court of Appeals
For the Ninth Circuit

COLUMBIA LUMBER COMPANY, INC. (a corporation),
Appellant,

vs.

BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of Barry Arm Camp,
Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

REPLY BRIEF TO BRIEF OF APPELLEES
AND
ANSWERING BRIEF ON CROSS-APPEAL.

FAULKNER, BANFIELD & BOOCHEVER,
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IN THE

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Upon Appeal from the District Court for the Territory of Alaska, Third Division.

REPLY BRIEF TO BRIEF OF APPELLEES AND ANSWERING BRIEF ON CROSS-APPEAL.

PRELIMINARY STATEMENT.

This case arises out of an alleged sale of property by appellees to the appellant company on or about March 24, 1948. Since the Honorable Court below found that there was no express contract of sale, it became necessary for appellees to prove an implied sale as a result of appellant's taking possession of ap-

pellees' property. The situation is complicated by the fact that in June, 1948, Mr. Morgan, president of appellant company, and Mr. Agostino, representing the appellees, entered into an oral agreement for the sale of the property involved in this case, which agreement was reduced to writing by Mr. Agostino's attorney. (Tr. 462.)

After this June agreement, and in reliance thereon, appellant actually took possession of the property until it was notified by appellees that the appellees revoked the contract (Tr. 196, 392), whereupon ap-appellant returned the property.

Appellees did not sue on the contract of June, 1948, but during the trial many loose statements were made to the effect that appellant took possession of the property. With the possible exception of appellant's having a crew land a scow in an unoccupied portion of a tideland pond, however, there is no evidence of appellant's taking possession of any of the appellees' property on or about March 24, 1948. Much of the conflict in the evidence can be resolved by noticing the pertinent dates involved; that is, the date of the implied sale, March 24, 1948, on which appellees base their entire case, and the date of the contract of sale repudiated by appellees, June, 1948. It then becomes apparent that there was no evidence to support the verdict of the jury since: (1) To establish an implied sale, appellees had to prove possession by appellant and there is no evidence of such possession by appellant on or about March 24, 1948; (2) Appellant took possession only after and in further-

ance of the contract of June, 1948; and (3) The contract of June, 1948, was repudiated by appellees.

Appellant respectfully disagrees with appellees' interpretation of the evidence set forth in the statement of fact in appellees' brief; but since this Honorable Court is well able to ascertain the true facts from the record and exhibits, no further statement will be made other than to mention the obvious tactics of appellees in attempting to distort the evidence so as to create sympathy for themselves and to vilify the appellant.

Appellant feels that an impartial reading of the evidence will show that appellees, having finished logging at Barry Arm, were determined to keep appellant out of the area unless an exorbitant price was paid to appellees for property not needed by the appellant. The evidence further shows that appellant, far from attempting to cheat appellees out of their property, made no false representations; and that, when a contract was entered into in June, appellant in good faith attempted to complete the agreement until the absence of appellees' attorney and appellees' revocation of the contract caused appellant to withdraw at considerable loss.

ARGUMENT.

I.

THERE WAS NO EVIDENCE TO SUPPORT THE VERDICT OF THE JURY, WHICH VERDICT WAS MANIFESTLY AGAINST THE EVIDENCE AND WAS THE RESULT OF PASSION, PREJUDICE, SYMPATHY, OR MISTAKE.

Counsel for appellees have taken the liberty of labeling appellant's first point as the one principally relied upon for reversal. While appellant feels that the verdict was not supported by the evidence, this point is by no means the only basis for reversal, as was made clear by appellant's brief in main.

Counsel, in answering the first point raised in appellant's brief, quoted from a portion of the trial judge's oral opinion on defendant's motion for a directed verdict at the close of plaintiffs' evidence in chief. (Appellees' Brief, page 27.) This statement of the trial Court, which was made before the appellant presented any evidence and therefore was based entirely on appellees' testimony, of course has no bearing on the legal argument as to whether there was adequate evidence to support the verdict of the jury and has been inserted for the sole purpose of attempting to prejudice appellant with this Honorable Court.

The legal propositions stated in appellant's brief in main are so well established that no further authorities need be cited in their support. Appellees apparently find fault with the cases cited for not involving the same factual situation as the subject case. Obviously the factual situation in the subject case is unique; but, when the well-established principles of law in regard to reversing verdicts not supported by

the evidence are applied to this case, it is appellant's respectful contention that the verdict in this case should be set aside.

The crux of the argument in regard to whether there is evidence to support the verdict of the jury in this case depends on whether the evidence, when most favorably viewed from appellees' standpoint, proves an acceptance of the property by the appellant *on or before March 24, 1948.* It is significant that appellees in their brief show no taking of possession other than by general statements applicable to the admitted possession under the June contract.

The evidence reveals that all that appellant did prior to July, 1949, was to authorize a logging crew to land in the unoccupied tidal waters at the mouth of Mosquito Creek. This action of appellant cannot be construed as a taking of possession of appellees' property so as to make appellant liable on an implied in fact contract of sale. Accordingly, the verdict is not supported by the evidence and should be reversed.

II.

THE HONORABLE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 5 OVER APPELLANT'S OBJECTION, SINCE THAT INSTRUCTION PERMITTED THE JURY TO CONCLUDE THAT LANDING A SCOW IN THE UNOCCUPIED PORTION OF A TIDEWATER POND, IN WHICH APPELLEES HAD PLACED A FEW PILINGS, CONSTITUTED A TAKING OF POSSESSION OF APPELLEES' PROPERTY BY APPELLANT SO AS TO COMPLETE A SALE.

In answering appellant's argument on this point, appellees make numerous statements as to the factual situation without support of references to the transcript. Appellant must respectfully disagree with appellees' statement of facts in regard to the tidewater pond in which a scow owned by appellant was landed by Mr. Lambert. As mentioned in appellant's opening brief, the evidence was conflicting as to the nature of this tidewater pond and the improvements made to it, if any. Mr. Agostino stated that approximately thirty hand-driven piles had been placed in a portion of the pond, but that no other work had been done upon the pond. (Tr. 162, 163.) Despite appellees' brief to the contrary, (see page 37 thereof), Mr. Agostino himself expressly testified that there were no improvements surrounding the pond. (Tr. 184.)

Mr. Morgan testified in regard to the pond as follows:

> "* * * there was no piling except a few little set posts in front of the so-called saw mill." (Tr. 409.)

Pictures of the pond were introduced into evidence by the appellees (see Exhibits 4, 10, 12, 16, 17, 19 and 24), and this honorable Court may judge for itself

from these exhibits and the testimony as to the actual nature of the improvements placed there by appellees. In any event, there was not one particle of evidence indicating that the scow was landed or that appellant took possession of a portion of the pond on which there were improvements placed by appellees.

In the face of the conflict of evidence in regard to the nature of the pond, and the necessity for the appellees to prove that appellant took possession of appellees' property on or about March 24, 1948, the trial Court's instruction in regard to the effect of the scow's landing in a portion of the pond became of paramount importance. The instruction as given hinged on the definition of "actual possession", which the Court stated gave a superior right to the tidelands. Instruction No. 5 defined actual possession as follows:

> "Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings. But exclusive uninterrupted and long continued possession and use for other purposes may give such superior right provided there is real and actual possession."

Admittedly there were some pilings placed in a portion of this natural tidewater pond by the appellees. The Court's instruction, by stating that actual possession is manifested by pilings without further explanation to the effect that a few pilings in a portion of the pond would not give a superior right to the entire pond, was tantamount to permitting the jury to find for the appellees even though the jury found that appellant merely landed a scow in an unoccupied portion of a tidewater pond.

Appellees, in their brief, apparently question the taking of proper exception to the trial Court's instruction. In addition to submitting two requested instructions which correctly state the law (Defendant's requested instructions number XX (Tr. 64) and XXVI (Tr. 67), counsel for appellant, in the portion of the transcript quoted by appellees in their brief at pages 44 and 45, expressly excepted to the Court's instruction on this point. It is also to be noted that exception was taken to the Court's refusal to give instructions numbers XX and XXVI.

The cases cited by appellees in an attempt to justify the Court's instruction all deal with littoral rights and are inapplicable to the subject case since appellees were not in possession of the upland property abutting on these tidelands. This is made clear by Mr. Agostino's testimony in regard to appellees upland improvements. He stated:

> "Q. Where was the pond or log pond as you call it, where was that with reference to your regular camp?
>
> A. It is a thousand feet from the bunkhouse on the east side." (Tr. 163.)

There was no showing of any possession of upland property closer to this pond than one thousand feet. Certainly appellees had no littoral rights which were involved in this suit.

The case of *Young v. Fitzgerald,* 4 Alaska 52, cited by appellees, involved an upland owner whose ingress and egress from his property was blocked by pilings placed by the plaintiff. The Court held, at page 55:

"* * * that such piles in the condition they were left by the plaintiff were calculated to interfere and obstruct the free access of the defendants from their upland holdings to such navigable water across the shore land."

And at page 56, the Court stated:

"There was no evidence * * * whatever that they had ever been divested of any littoral right.

The piles placed in the shore by the plaintiff interfered with defendant's free access to the waters of Gastineau Channel * * *."

Similarly, the case of *McKloskey v. Pacific Coast Co.*, 160 Fed. 974, deals entirely with the question of littoral rights and interference of an upland owner's right of ingress and egress.

The other case cited in appellees' brief, *Decker v. Pacific Coast S. S. Co.*, 164 Fed. 974, while also dealing with littoral rights, is directly adverse to appellees' contentions. It is stated in the first syllabus of that case as follows:

"An owner of lands in Alaska which border on tidal waters has no title to the soil below high-water mark, and cannot enjoin the maintenance of a wharf or other structure in aid of navigation thereon, unless it prevents his own free access to the navigable waters."

Appellant, in arguing point number two in its brief, pointed out the Court's failure to instruct on the paramount rights of the United States and those holding rights granted by the government to tidelands and unoccupied portions of the public domain. This was of

importance since appellant had a government permit to go upon the lands involved in this suit and to cut timber thereon (Tr. 281, 282), and there was evidence to show that appellees had no timber permit in March of 1948. (Tr. 311.) Appellant expressly excepted to Instruction No. 5 for that reason. (Tr. 638, 639.)

Appellees do not deny that an instruction should have been given on this point but attempt to circumvent this error by stating that no exception was taken on this ground. Apparently counsel overlooked the fact that when Instruction No. 5 was first given, counsel for appellant excepted as follows:

> "Mr. Davis. I would like then to except to the latter paragraph of that Instruction 5 insofar as the talked about claim of possession without defining what 'possession' is and on the ground we had with plaintiffs equal right to use those tidelands with the plaintiffs except insofar as they have excluded them from the public domain.
>
> Mr. Boochever. There is nowhere stated—It states in line 11 that if you find in this case that plaintiffs were in the actual possession and use of any tidelands then in that event they were entitled to remain in possession thereof as against all other claims or claimants seeking possession of such tidelands from the plaintiffs, because it is a well established law that the United States has paramount title to the tidelands and a right under the United States.
>
> The Court. If you mention the United States and mix it up in this it is just one more thing for the jury to consider and the United States is not involved in this case at all. Counsel is quite correct as to the law but I don't see how—why the in-

struction should properly make that exception in the case of the United States.

Mr. Boochever. Well, at least as far as the public lands above tidelands, the rights of the United States are of great relevancy and the rights of each, we feel, is very essential, which should be stated in this case as it goes to the very essence of this argument.

The Court. I think that is covered in the last part of 5. However, you have your exception."

It thus appears that the honorable trial Court erred in giving its Instruction No. 5, both in regard to its definition of the type of possession giving a superior right to tidelands and in regard to its omission of any reference to the paramount rights of the United States and one having a permit from the United States to unoccupied portions of tidelands and the public domain.

III.

THE DISTRICT COURT ERRED BY REFUSING TO INSTRUCT THE JURY THAT KENNETH LAMBERT WAS AN INDEPENDENT CONTRACTOR AT ALL TIMES AFTER APRIL 1, 1948 SINCE ALL THE ORAL EVIDENCE AND THE WRITTEN CONTRACT EXECUTED BETWEEN THE APPELLANT AND LAMBERT COULD ONLY BE CONSTRUED AS ESTABLISHING AN INDEPENDENT CONTRACT RELATIONSHIP.

Counsel for appellees do not dispute the fact that as a matter of law Kenneth Lambert was an independent contractor at all times after April 1, 1948. Their answers to the contention that the Court was in error in leaving this question to the jury by virtue of its instruction 6D (Tr. 88 and 89), are that the point is

immaterial, the Court's instruction thus amounting to harmless error; and secondly that no proper exception was taken to the Court's instruction on this point. In addition counsel make the same irrelevant and mistaken accusations against the appellant which appear throughout the brief for appellees.

Mr. Morgan is accused of attempting to cheat appellees out of their property. The evidence to the effect that appellant did not want appellees' property, that it had a valid right granted by the Forest Service to cut timber in the area in dispute, and that, until the contract of June, it never considered itself to have purchased any of appellees' property and had expressly forbidden anyone associated with appellant to use that property, is completely disregarded. So is the evidence that appellees had no further intention of logging in the area and were attempting in effect to "hold up" appellant in an effort to secure an exorbitant price for property of no further value to appellees. Of course these considerations have no basis for being a part of a legal appeal brief but, in view of appellees' loose statements, appellant feels obliged to mention them.

Counsel for appellees state that Mr. Hooper, an employee of Columbia Lumber Company, was living in the cook house and bunk house at the time of the trial, without pointing out that Hooper testified that he was living there by express permission of Mr. Agostino. (Tr. 341, 342.)

They further state as a fact that appellees' timber to the northwest of their camp was all cut and that

the logs went to the Columbia Lumber Company; although the testimony of Mr. Jacobson, the Forest Service supervisor, was that this timber had not been completely cut even at the date of the trial. (Tr. 285.) Furthermore, the testimony was uncontradicted that Mr. Morgan, president of appellant company, instructed Lambert not to use any of appellees' property (Tr. 375, 533 and 598) and that Lambert was never given authority by Columbia Lumber Company to cut appellees' timber. As a matter of fact, Mr. Jacobsen, supervisor for the Forest Service, and Mr. McAllister both testified that appellees' timber was not cut; but assuming, as contended by appellees, that it was, certainly the status of Mr. Lambert at the time of the cutting was material.

He testified:

> "A. I started falling timber on the 6th day of April.
>
> Q. From then on you were on your own as a contractor?
>
> A. Yes." (Tr. 263.)

Counsel for appellees argued throughout the trial, and even in their brief on appeal, that certain timber of appellees was cut by appellant; and it appears strange that now for the first time they raise the argument that it was immaterial whether Lambert was an independent contractor or an employee of appellant at the time this timber was allegedly cut.

Moreover, considerable point was made of the fact that Lambert had borrowed or taken some barrels of oil from appellees. This fact impressed the jury to

such an extent that a juror specifically asked a question concerning those barrels (Tr. 435), and counsel for appellees mentioned them as the property of appellees used by Lambert.

Moreover, the honorable trial judge was of the opinion that the question of whether Lambert was an independent contractor after April 1 was sufficiently material to warrant an instruction, and counsel for appellees did not object that this instruction was unnecessary. Surely appellant was entitled to a correct instruction, explaining to the jury that after April 1, 1948, Lambert was an independent contractor whose actions, except where expressly authorized, were not binding on appellant.

The only other answer advanced by appellees to this error of the trial Court is so patently specious as hardly to warrant a reply. Although counsel for appellant repeatedly raised the objection of Mr. Lambert's status throughout the trial, submitted instructions to the Court correctly stating the law as to his status (see Defendant's Requested Instructions, No. XIV (Tr. 62) and XXIV (Tr. 66, 67) and record of exceptions taken, signed by the trial judge), and expressly excepted to the Court's leaving this question to the jury after the Court's instructions had been given to counsel (Tr. 643, 644), the learned counsel for appellees are so wanting of a valid answer to this point that they state:

> "to raise a backhand question of this kind for the first time, in the appellate court, would be extremely unjust to the trial judge." (Brief of Appellees, p. 49.)

It is hard to imagine how the objection to the Court's failure to instruct as to Mr. Lambert's status as an independent contractor could have been more forcibly drawn to the trial judge's attention, and it is respectfully submitted that the Court's error in failing so to instruct the jury materially prejudiced appellant and may well have been the reason for the jury's erroneous verdict.

IV.

THE ALLEGED ORAL CONTRACT OF SALE OF MARCH 24, 1948, WAS NOT ENFORCEABLE AS FALLING WITHIN THE PROVISIONS OF THE STATUTE OF FRAUDS, ACLA 1949, SECTION 29-1-12, SINCE THERE WAS NO SUCH ACCEPTANCE OR RECEIPT AS TO TAKE THE CONTRACT OUT OF THE STATUTE; AND THE COURT'S INSTRUCTION NO. 4 WAS ERRONEOUS IN STATING UNDER THE CIRCUMSTANCES OF THIS CASE THAT "AN ORAL CONTRACT FOR THE SALE OF PERSONAL PROPERTY MAY IN LAW, IF PROVED, BE JUST AS VALID AND ENFORCEABLE AS THOUGH IT WERE WRITTEN".

Appellees do not argue with the legal authorities cited by appellant in support of their contention that the alleged oral contract of sale of March 24, 1948, was unenforceable under the provisions of Section 29-1-12 ACLA 1949; but contend there was a delivery of the property to appellant and an unequivocal acceptance by it. Since the facts of this case have been discussed at some length, it will suffice to state that once the distinction is made between the actions of appellant on or about March 24, and its actions after the admitted contract entered into in June, 1948, it becomes apparent that "on or about March 24, 1948"

appellant never accepted the property "by some unequivocal act done on the part of the buyer with intent to take possession of the goods as owner." *Hinchman v. Lincoln,* 124 U.S. 38.

Counsel for appellees state that there is no better settled rule of law than the portion of the Court's Instruction No. 4 objected to by appellant, which stated:

> "Contracts for sale and purchase of personal property are sometimes put in writing, but not always. An oral contract for the sale of property may in law, if proved, be just as valid and enforceable as though it were written."

They cite no authorities, allegedly for the reason that they "would not want to insult the intelligence of this high Court". (Brief of Appellees, p. 49.)

Appellant, nevertheless, is obliged to state that it has been unable to discover authorities in support of appellees' contention in that regard, where as in the subject case it is undisputed that the property alleged to have been sold is of a greater value than $500.00 and the provisions of the Statute of Frauds require such contracts to be in writing.

An oral contract of sale would be proved when there is undisputed testimony as to the words constituting the agreement to buy and sell. Yet, can it be contended that such an oral contract in and of itself is "valid and enforceable" where a Statute of Frauds requires such contracts to be in writing?

Despite the opinion of learned counsel for appellees, appellant believes that the trial Court erred in

giving the above quoted portion of Instruction No. 4, and it is to be noted that this opinion is substantiated by *Corpus Juris* as follows:

> "A contract of sale must be in writing where it comes within the provisions of the Statute of Frauds, relating to the sale of goods, wares, and merchandise, which provisions are, in some jurisdictions now embodied in statutes adopting the Uniform Sales Act." 55 *C. J.* 188.

See also *Ft. Dearborn Coal Co. v. Borderland Coal Sales Co.,* 7 Fed. (2d) 441, and cases cited in appellant's opening brief, page 45.

V.

ON OR ABOUT JUNE 29, 1948, THE PARTIES HERETO ENTERED INTO AN AGREEMENT FOR THE SALE OF THE PROPERTY IN QUESTION. SINCE THIS AGREEMENT WAS REDUCED TO WRITING, SIGNED BY APPELLEES, AND SINCE APPELLANT TOOK POSSESSION OF THE PROPERTY UNDER THE TERMS OF THIS AGREEMENT, THE COURT ERRED IN PERMITTING EVIDENCE TO BE INTRODUCED OF AN ALLEGED PRIOR INCONSISTENT ORAL AGREEMENT INVOLVING THE SAME TRANSACTION.

In answer to appellant's Argument V, appellees again resort to sophistic reasoning. The legal authorities cited by appellant are not disputed; but appellees base their answer on an interpretation of the evidence intended to show that Mr. Morgan did not sign the contract entered into in June, 1948, and reduced to writing by Mr. Agostino's attorney, Mr. Butcher. As pointed out in appellant's opening brief, it was immaterial whether the contract was signed by appellant in

view of its letter of July 19, 1948, and its actions under the contract. In any event, however, Mr. Morgan testified that he did sign the contract (Tr. 403); but appellees apparently believe it is of great significance that while in appellant's answer it is stated that Mr. Morgan signed the contract "on or about the 10th day of July, 1948" (Tr. 23), (not "on the 10th day of July, 1948" as stated in Brief of Appellees, p. 53), in cross-examination Mr. Morgan answered the question as to when he signed the contract, as follows:

> "A. The exact date would be hard to state because it was some time in July." (Tr. 403.)

The specious argument is made that the contract is dated July 29, 1948. This date was explained by all parties involved as being in error, the correct date being June 29, 1948, as admitted on page 12, Brief of Appellees.

Appellees' counsel also considers it significant that in writing to Mr. Butcher on July 19, 1948, Mr. Morgan stated that he had signed a check in the sum of $3300.00 and left it with Mr. Summers, while later he testified that he had signed checks in the sum of $5000.00 and left them with Mr. McCarrey. Mr. Morgan explained that additional checks which would become due within the month were signed and left with Mr. Schmidt, who took care of the matter in place of Mr. Summers, and that they were to be delivered to Mr. McCarrey so that they would be available when due. (Tr. 386 to 388.) Of course, it was only necessary to refer to the check for $3300.00 in the letter to Mr. Butcher. This check was to be paid to

the Clerk of the Court through Mr. Butcher; and the testimony is clear that Mr. Morgan did all within his power to contact Mr. Butcher personally and that, when that failed, Mr. Morgan wrote him a letter expressly accepting the contract and providing for the payment of the check in the sum of $3300.00 as soon as a list of the property was furnished. (Tr. 385.) It is true that Mr. Morgan stated in the letter of July 19th, written after he had failed to meet with Mr. Butcher due to the latter's absence, that Mr. Butcher "would not expect me to sign it without a definite understanding as to what the $10,000.00 is going to purchase." This, however, is not inconsistent with his having signed the contract and left it with his agent together with instructions that it was not to be delivered until the list was furnished.

Mr. Morgan specifically stated in this letter:

> "I have signed a check in the sum of $3300.00 and left it with Mr. C. D. Summers with instructions to pay it to the clerk of the court upon your giving him an acceptable list of all the personal property which the Columbia Lumber Company is to get under the contract."

That is hardly the type of letter and the course of action that would be taken by one attempting to get out of paying under a contract; since it, together with appellant's actions in taking possession of the property under this contract in July, 1948, obviously made the agreement binding on appellant had not the appellee revoked it.

The terms of the contract having been orally agreed upon, reduced to writing, signed by Mr. Agostino for

the appellees, and accepted by the appellant by its taking possession of the property and by its letter of July 19, 1948, it was error for the trial Court to permit testimony of a prior inconsistent oral agreement.

VI.

THE COURT ERRED IN PERMITTING TESTIMONY OVER APPELLANT'S OBJECTION AS TO THE CONTENTS OF AN ALLEGED TELEGRAM PURPORTING TO GRANT APPELLEES A CONTINUATION OF THEIR TIMBER PERMIT.

Appellees' principal answer to appellant's argument VI is based upon the contention that Mr. Lambert had previously testified as to the contents of the telegram. When Mr. Lambert testified originally, the cause of action was based upon an express contract. What appellees actually owned was not of paramount importance. It was for this reason that no objection was made to Mr. Lambert's original testimony about the contents of the alleged telegram extending Mr. Agostino's timber permit. At that time the testimony appeared to be immaterial.

On Mr. Lambert's redirect testimony, the cause of action had been amended to one based on *quantum valebant;* and, since part of appellees' contention on this theory was based on the allegation that appellant had cut some of appellees' timber, it became of importance to show whether appellees had a right to that timber at the time of the alleged taking. Thus Mr. Jacobsen, the Forest Service Supervisor of this area, testified that appellees' timber permit had expired on December 31, 1947, and that an extension was not

granted until midsummer of 1948, after the date of the alleged implied sale. (Tr. 311.)

Since the point now was of significance, appellant objected to the questions asked Mr. Lambert on redirect examination as to the contents of this alleged telegram. Objection was first made on the grounds that it was improper rebuttal testimony. The honorable trial Court erroneously overruled this objection. (Tr. 583.) The question was then objected to on the grounds that testimony by Mr. Lambert as to the contents of an alleged telegram written by someone in the Forest Service was hearsay. Again the objection was overruled, and this incompetent testimony was allowed.

Counsel for appellees apparently take the position that appellant's counsel, after having their objections overruled, were required to repeat their objections when the question was repeated after the Court's ruling. Were this a requirement, trials might last endlessly with a question being asked, objection made, overruled by the Court, question repeated, objection being made again, etc., *ad infinitum*.

The reference to 20 Am. Jur. 414, cited by appellees, admittedly is an accurate statement of the law where a telegram is admissible; but it in no way alters the hearsay rule; and secondary evidence as to the contents of a telegram are not admissible where the telegram itself would be inadmissible as containing a written statement made by one not a party to the suit. (See cases cited in appellant's opening brief, pages 52, 53.)

Of course, it is imposible to ascertain definitely what evidence materially affects the decision of a jury; but it is probable that the Court's error in admitting this testimony just prior to the conclusion of the case prejudiced appellant; and it is respectfully submitted that the admission of this testimony constituted reversible error.

VII.

THE COURT ERRED IN ALLOWING APPELLEES FURTHER TO AMEND THEIR AMENDED COMPLAINT AFTER APPELLEES HAD RESTED, SINCE THE SECOND AMENDED COMPLAINT WAS BASED ON A SUBSTANTIALLY CHANGED CAUSE OF ACTION.

Appellees rely on the provisions of the Rules of Procedure of the District Courts of the United States in attempting to answer point VII of appellant's brief. These rules, however, did not become applicable to the Territory of Alaska until July 18, 1949. (See 48 USCA, Section 103a.) Accordingly, at the time of this trial in June, 1949, the District Court for the Territory of Alaska was governed by the provisions of Section 55-5-76, ACLA, 1949, in regard to amendments of pleadings. As set forth in appellant's opening brief, it is respectfully submitted that the amendment from a cause of action based on express contract to one based on *quantum valebant* was a substantial change. Appellant was not prepared to submit evidence as to the value of the property in question and accordingly was prejudiced by the allowance of this amendment.

VIII.

THE COURT ERRED IN DENYING APPELLANT'S MOTIONS TO STRIKE PORTIONS OF APPELLEES' SECOND AMENDED COMPLAINT AND MAKE MORE DEFINITE AND CERTAIN AND TO STRIKE PORTIONS OF APPELLEES' REPLY; SINCE IMPROPER ALLEGATIONS HIGHLY PREJUDICIAL TO APPELLANT WERE PERMITTED TO GO TO THE JURY BY VIRTUE OF THE COURT'S DENYING THESE MOTIONS.

Appellees apparently do not dispute the fact that the matters objected to in appellant's motions to strike were improper and prejudicial. These motions as well as the amended pleadings to which counsel refers as a "monstrosity" had to be prepared during the course of the trial as a result of the amendment of appellees' amended complaint. Argument was had in regard to the motion addressed to the Second Amended Complaint and the trial Court denied the motion. (Tr. 299-300.) The motion to strike portions of the reply required no argument. Moreover, the trial Court waived any such requirement on the part of counsel to request a hearing on this motion, as appellees apparently contend was necessary.

> "Mr. Boochever. May it please the Court, we were served with a reply in this matter this morning and we are preparing a motion in regard to that reply. It hasn't been typed yet. I must advise Your Honor of that fact.
>
> The Court. All of these matters may be considered as having been presented and argued and disposed of before the case is finally disposed of. Counsel will preserve that right." (Tr. 377.)

It is again respectfully submitted that the matters contained in the Second Amended Complaint and

Reply which were made the subject of Motions to Strike submitted in writing by the appellant were highly prejudicial, and it was error of the honorable trial Court to deny these motions and permit the improper and damaging portions of the pleadings to go to the jury during its deliberations.

ANSWER TO CROSS-COMPLAINT.

I.

THE ALLOWANCE OF ATTORNEYS' FEES BY THE TRIAL COURT IS A MATTER PECULIARLY WITHIN THE DISCRETION OF THE TRIAL COURT AND IN THE ABSENCE OF ABUSE OF DISCRETION SHOULD NOT BE REVERSED.

Since Bruno Agostino and Stanley Socha have been referred to as appellees throughout this brief they will be so referred to in answering their cross-complaint.

The contention is made that the District Court's allowance of $250 for attorneys' fees is inadequate in this case. As stated in 20 C.J.S. 462:

> "If the amount is not prescribed by statute or agreement, the Court has the power, within the limits of judicial discretion, to fix the amount of the attorneys' fees; and unless it is shown that the Court has abused its discretion, the reviewing Court will not interfere."

This honorable Court has stated:

> "The further point, in connection with the allowance of this attorney's fee, that there was no evidence as to a reasonable amount, is not open to examination. If it were, we would be inclined to hold that the court is as good a judge of reason-

ableness of attorney fees for services in that court as anyone."

Forno v. Coyle, 75 F. (2d) 692.

Clearly the District Judge was well able to judge a proper attorneys' fee in this case, and there is no abuse of discretion in that regard so as to warrant a reversal on that point.

II.

APPELLEES' CONTENTION THAT INTEREST IS ALLOWABLE PRIOR TO THE DATE OF JUDGMENT IS INCORRECT SINCE SECTION 25-1-1, ACLA, 1949, PROVIDES THAT INTEREST IS PAYABLE ON MATURED ACCOUNTS FROM THE DAY THE BALANCE IS ASCERTAINED, WHICH IN THE SUBJECT CASE WAS THE DATE OF THE JUDGMENT.

Although counsel for appellees contend that they were entitled to interest from the date of the alleged sale to the date of the judgment, it is noted that no cases are cited in support of this contention. Section 25-1-1, ACLA, 1949, is the Alaska Statutory provision for the allowance of interest.

This section provides:

"Legal Rate of Interest. The rate of interest in the Territory of Alaska shall be six per centum per annum, and no more, on all moneys after the same become due; on judgments and decrees for the payment of money; provided that judgments and decrees hereafter rendered founded on contracts in writing providing for the payment of interest until paid at a specified rate exceeding six per centum per annum, and not exceeding ten per centum per annum, shall bear interest at the

> rate specified in such contracts, provided that such interest rate is set forth in the judgment or decree; on money received to the use of another and retained beyond a reasonable time without the owner's consent expressed or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained; on money due or to become due where there is a contract to pay interest and no rate specified. But on contracts, after passage and approval of this Act, interest at the rate of eight per centum may be charged by express agreement of the parties, and no more."

This statutory provision is identical with that provided in the 1913 Session Laws of Alaska, c. 17, except for a reduction in the amount of interest allowable. This honorable Court has interpreted the statute as follows:

> "It is clear that in the amendment of 1913 the Alaskan Legislature intended to provide: First, for interest at 8 per cent on all money after the same became due; second, for 8 per cent on judgments and decrees for the payment of money unless the judgment was based upon contract providing for more than 8 per cent and not exceeding 12 per cent when the judgment was to bear interest at the contract rate to be specified in the decree. The balance of the sentence fixes the time when the money becomes due, within the meaning of the first clause of the section."
>
> *New York Alaska Gold Dredging Co. v. Walbridge,* 38 F. (2d) 199 at page 205.

The statute provides that interest is payable "on money due on the settlement of matured accounts

from the day the balance is ascertained." Although appellant contends that no amounts should be due, even though the judgment of the Court below were considered to be correct, the balance due was not ascertained until the date the judgment was rendered; so that, in any event, interest only runs from that date.

CONCLUSION.

It is respectfully submitted that appellees' cross-complaint should be regarded as naught; and that, because of the erroneous verdict and errors committed, the judgment of the District Court should be reversed and the case remanded to the Court for entry of a judgment in favor of appellant.

Dated, Juneau, Alaska,
June 9, 1950.

Respectfully submitted,
FAULKNER, BANFIELD & BOOCHEVER,
R. BOOCHEVER,
Attorneys for Appellant.

No. 12395

United States Court of Appeals

For the Ninth Circuit.

RUIS PARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court Western District of Washington, Northern Division.

FILED

JAN 4 - 1950

PAUL P. O'BRIEN,
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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United States District Court, Western District of Washington, Northern Division

No. 47756

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUIS PARKER,

Defendant.

INDICTMENT

The Grand Jury Charges:

Count I.

On or about the 24th day of November, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ruis Parker did knowingly receive and conceal a quantity of narcotic drugs, to wit: Two Hundred Ninety-four (294) grains of Opium Prepared for Smoking and Seventy-five (75) grains of Yen Shee, knowing the same to have been imported into the United States contrary to law.

All in violation of Section 174, Title 21, U.S.C.

A True Bill

/s/ THOMAS H. OLIN,
Foreman.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ VAUGHN E. EVANS,
Asst. U. S. Attorney.

[Endorsed]: Filed Dec. 29, 1948.

[Title of District Court and Cause.]

ARRAIGNMENT AND PLEA

Before: The Honorable John C. Bowen,
District Judge.

January 3, 1949, 9:30 o'clock, A.M.

The Court: The Court has before it the Indictment in the case of the United States of America, Plaintiff, vs. Ruis Parker, Defendant. Has the defendant received from the United States Attorney a copy of this Indictment against him?

Defendant Parker: Yes, sir.

The Court: Is your name as written in the Indictment; namely, R-u-i-s as the given name and P-a-r-k-e-r as the family name your true and correct name?

Defendant Parker: Yes, sir.

The Court: The defendant is now in person before the Court, is that true?

Defendant Parker: Yes, sir.

The Court: With his counsel, Judge Pomeroy?

Defendant Parker: Yes, sir.

The Court: Judge Pomeroy, do you agree to act for this defendant as his counsel?

Judge Pomeroy: Yes, Your Honor.

The Court: Does the defendant accept Judge Pomeroy as his counsel?

Defendant Parker: That's right.

The Court: Does the defendant waive the reading of the Indictment?

Judge Pomeroy: The reading of the Indictment is now waived.

The Court: Is the defendant ready to enter his plea?

Judge Pomeroy: We are ready to enter a plea of not guilty, if the Court please, giving us a week for the opportunity to move against the Indictment.

The Court: The right for seven days from this date to move against the Indictment is preserved, notwithstanding the plea which may be entered. What is the defendant's plea to this Indictment, consisting of Count I and only Count I, guilty or not guilty?

Defendant Parker: Not guilty.

The Court: Let that plea be entered.

(Case to be placed on assignment calendar for February 23, 1949.)

[Endorsed]: Filed Jan. 6, 1949.

[Title of District Court and Cause.]

MOTION TO SUPPRESS EVIDENCE

Comes Now the defendant, Ruis Parker, by his attorney of record, Allan Pomeroy, and hereby moves this Court that certain property which is hereafter more particularly described, of which he is the owner and which was on the 24th day of November, 1948, from his premises unlawfully seized and taken from him, be returned to him and that

it be suppressed as evidence, as well as any evidence obtained as a result of the unlawful search and seizure. Description of the property:

294 grains of Opium prepared for smoking
75 grains of Yen Shee

all of which property was seized against the will of of the petitioner and without a search warrant or a warrant of arrest, and prior to the arrest of your petitioner without a warant, and after an exploratory search, in clear violation of the rights of your petitioner under the provisions of the Fourth and Fifth Amendments to the Constitution.

/s/ ALLAN POMEROY,
Attorney for Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed April 21, 1949.

[Title of District Court and Cause.]

PETITION IN SUPPORT OF MOTION TO SUPPRESS

Comes Now the defendant, Ruis Parker, residing at Apt. B, 1219½ Yesler Way, in the City of Seattle, Northern Division of the Western District of Washington, and states and alleges as follows:

By indictment filed in the Northern Division of the Western District of Washington, I was indicted for violating Section 174, Title 21, U.S.C.

I interposed a plea of "Not Guilty" to the said charge.

On November 24, 1948, I was lawfully in my residence at Apt. B, 1219½ Yesler Way, in the City of Seattle, Washington; the door to my apartment was locked and the outside door to the apartment building was locked; that I was asleep in my apartment; that 5 officers walked into my bedroom and awakened me and then, over my objection, then searched the premises of my apartment. In this search the property described in my Motion hereto attached was found and I was then placed under arrest. The said agents or officers had no right to enter my premises and make a search and place me under arrest without a warrant of arrest or a search warrant.

I, therefore, claim that my rights were invaded in the seizure of my personal property and I ask and pray for the return of that property and that the evidence, if it is intended to be used against me, obtained without a lawful search warrant and warrant of arrest, be suppressed, as my rights under the provisions of the Fourth and Fifth Amendments of the Constitution have clearly been violated, and I respectfully pray for the following relief:

1. That all such evidence be excluded upon the trial of the action, and that this Honorable Court now make its order of suppression.

2. That all of the aforesaid property so unlawfully seized without a search warrant or warrant of arrest which was obtained from me by means of a trespass be returned to me.

Dated at Seattle, Washington, this 16th day of April, 1949.

/s/ RUIS PARKER,
Petitioner.

State of Washington,
County of King,
City of Seattle—ss.

Ruis Parker, above named, being duly sworn, deposes and says: That he is the petitioner herein, that he has read and knows the contents of the foregoing petition, and that the same is true to his own knowledge.

/s/ RUIS PARKER.

Subscribed and Sworn to before me this 16th day of April, 1949.

[Seal] /s/ MARIAN M. PARKS,
Notary Public in and for the State of Washington, residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed April 21, 1949.

[Title of District Court and Cause.]

AFFIDAVITS OF ROBERT W. MORRIS, ROBERT W. WAITT, ROBERT R. MUSSELMAN AND ANDREW E. ZUARRI

Comes now the plaintiff United States of America and furnishes herewith affidavits of Robert W. Mor-

ris, Robert W. Waitt, Robert R. Musselman and Andrew E. Zuarri in opposition to the Defendant's Motion to Suppress Evidence.

/s/ J. CHARLES DENNIS,
United States Attorney.
/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

AFFIDAVIT OF ROBERT W. MORRIS

United States of America,
Western District of Washington,
Northern Division—ss.

Robert W. Morris, being first duly sworn, on oath deposes and says:

I am a Captain of the Seattle Police Force in charge of the Felony Detail.

On the night of November 24, 1948, I was in my office in the Police Department about 9:30 P.M. when I received a telephone call from an unknown party. The voice on the telephone stated that there was an unconscious man in the apartment at the head of the stairs on the Second floor at 1219½ Yesler Way; that the man looked like he was dying. The voice on the phone refused to reveal his identity, but stated he would meet the officers at the door.

Since I was just about to leave the Police Department with my detail, I decided to go to the address given by the voice on the telephone to investigate. The police receive calls such as this every day, which arise from assault, attempted

suicides, overdoses of sleeping tablets, food poisonings and the like.

I went with my Squad to 1219½ Yesler Way. I left two men in the car and took two men with me. The building at this address is an apartment house. The front door was unlocked, as are the front doors of most apartment houses. We walked to the front door and up the stairs. There was no one in hallways or on the stairs. The lights were on and visibility was good.

At the head of the stairs on the left was a door which was open about a foot. I pushed the door all the way open and called out "Is anybody home?" No response was heard. We walked into the first room, which was a living room, and found no one in that room. I called out three or four times "Is anyone home?" as we walked through the living room into the dining room. There was no response. There was a door leading from the dining room which was closed. I opened this door and saw a man lying on a bed. I walked on in and as I did so the man opened his eyes. I said "What seems to be the trouble?" The man on the bed, whom I later learned to be Ruis Parker, said "There it is." I said "There what is?" He said again "There it is," pointing to an opium smoking outfit on the bed. I then identified myself as Captain Morris of the Police Department. Parker said "Yes, I know, help yourself." I had never seen Parker before, but he apparently knew me.

The outfit was examined and a small jar of opium

was accompanying the outfit. I caused the premises to be searched and found 294 grains of Opium prepared for smoking and 75 grains of Yen Shee.

I never did see the man who was supposed to have made the telephone call.

Two days later, I called the Federal Bureau of Narcotics and turned the evidence over to them.

/s/ ROBERT W. MORRIS.

Subscribed and sworn to before me this 25th day of April, 1949.

[Seal] /s/ VAUGHN E. EVANS,

Notary Public in and for the State of Washington, residing at Seattle.

AFFIDAVIT OF ROBERT W. WAITT

United States of America,
Western District of Washington,
Northern Division—ss.

Robert W. Waitt, being first duly sworn, on oath deposes and says:

I, Robert W. Waitt, am a detective on the Seattle Police Force.

On November 24, 1948, about 9:00 o'clock in the evening, I was in Captain Morris' office with other members of the Felony Detail. We were just getting ready to leave when Captain Morris got a telephone call. When Captain Morris got through with the telephone call, he said "Come on, let's go take a look, a man has been poisoned." I said

"Where?" Captain Morris said "Meet me at 12th and Yesler." Detective Zuarri and I went to our Police car and drove to 12th and Yesler. Captain Morris was waiting on the corner when we got there. As we met Capt. Morris, Detective Musselman and Detective Ivy came up. We had all arrived from the Police Station by three cars, as we were all going out on other business together.

Capt. Morris said to myself and Detective Musselman to come with him and for Detective Zuarri and Ivy to stay downstairs.

The three of us went into the main entrance of an apartment house. The door was not locked, which is usual in most apartment houses in that area. The lights were on and visibility was good in all the hallways. We saw no one. We went up the stairs, Capt. Morris in the lead, and at the head of the stairs on the left was a door which was open about eight inches. Capt. Morris pushed the door all the way open and called out "Is anybody home?" There was no response. We walked on into the living room, through an arch into the dining room, as Capt. Morris kept calling "Is anybody home?" There was no response.

There was a door which was closed leading from the dining room. Capt. Morris opened this door and walked in. There was a light on in this room, but no other lights on in the apartment. However, the rest of the apartment was lighted by street lights.

As Captain Morris walked in, I was right behind

him. There was a man on the bed. Capt. Morris asked the man a question and the man said "There it is." I am not sure just what Capt. Morris had asked the man, but I believe it was "What's the trouble?" I was standing at the foot of the bed and saw an opium smoking outfit on the bed near the foot. There was also a small jar of opium on the bed. Capt. Morris identified himself and the man whom I later learned to be Ruis Parker said "I have been expecting you," or words to that effect.

Capt. Morris asked Parker if this was an opium smoking outfit and Parker said "Yes." Capt. Morris placed Parker under arrest. We then searched the apartment and found 294 grains of Opium prepared for smoking and 75 grains of Yen Shee. I had never seen or heard of Ruis Parker before.

/s/ ROBERT W. WAITT.

Subscribed and sworn to before me this 25th day of April, 1949.

[Seal] /s/ VAUGHN E. EVANS,

Notary Public in and for the State of Washington, residing at Seattle.

AFFIDAVIT OF ROBERT R. MUSSELMAN

United States of America,
Western District of Washington,
Northern Division—ss.

Robert R. Musselman, being first duly sworn, on oath deposes and says:

I, Robert R. Musselman, am a detective with the Seattle Police force on the Felony Detail.

On the 24th of November, 1948, at about 9:00 P.M. I was in an office adjoining Captain Morris' office. The Felony Detail was just preparing to leave the Station. Capt. Morris called in to me and told me to meet him at 12th and Yesler.

When I arrived at 12th and Yesler with Detective Ivy, I met Captain Morris, Detectives Zuarri and Waitt, who had gotten there before me. At Capt. Morris' orders, Waitt and I went with him into an apartment house. The main door was unlocked, which is the usual custom in this area of Seattle until 10:00 P.M. The hallways were lighted and there was no one in sight. We, all three, went up stairs, Capt. Morris in the lead, followed by Detective Waitt, then myself.

At the head of the stairs, Capt. Morris pushed a door open to his left and called out "Is anybody home?" There was no response. Capt. Morris and Waitt went on into the apartment and I followed. Capt. Morris kept calling "Is anybody home?" As Capt. Morris and Waitt started into a room off the dining room, I went on back into the kitchen and

finding no one there, I went into a bathroom, which also leads to the room into which Capt. Morris and Waitt had gone. I entered the bedroom where Capt. Morris and Waitt were, from this bathroom. When I came into the bedroom, Ruis Parker was on the bed with an opium smoking outfit beside him. Capt. Morris was ordering Parker to get dressed as I walked in.

At Capt. Morris' orders, I assisted in searching the premises, where we found: 294 grains of Opium prepared for smoking and 75 grains of Yen Shee.

I had never seen Ruis Parker before or had never heard of him before. I was never told why we were going into the apartment, but was just told to come along.

/s/ ROBERT R. MUSSELMAN.

Subscribed and sworn to before me this 25th day of April, 1949.

[Seal] /s/ VAUGHN E. EVANS,

Notary Public in and for the State of Washington, residing at Seattle.

AFFIDAVIT OF ANDREW E. ZUARRI

United States of America,
Western District of Washington,
Northern Division—ss.

Andrew E. Zuarri, being first duly sworn, on oath deposes and says:

I, Andrew E. Zuarri, am a Detective with the Felony Detail of the Seattle Police Force.

On November 24, 1948, I was in Captain Morris' office about 9 to 9:30 P.M. The Felony Squad was about to leave the Station when Capt. Morris got a telephone call. I heard none of the conversation, but when he finished the call, he got up and said to his detail "Come on, let's go take a look, a man has been poisoned," or words to that effect. Some one asked where, and Capt. Morris said "Meet me at 12th and Yesler."

I went with Detective Waitt and met Capt. Morris at 12th and Yesler. As we met Capt. Morris, Detectives Ivy and Musselman came up on foot. Capt. Morris ordered Ivy and myself to stay outside, that he would call us if he needed us. Capt. Morris took Waitt and Musselman and went in to the apartment house in front of which we were standing. The door was unlocked, as are most apartment houses in Seattle until about 10 P.M.

A few minutes later, one of our detail called to us from a window to come on up. We went up to the apartment at the head of the stairs. We assisted in the search of the apartment and found:

294 grains of Opium prepared for smoking and 75 grains of Yen Shee.

I talked to Parker while we were making the search. He stated he was glad that this had happened and he hoped he would be sent somewhere to take a cure. He seemed to be glad to have us search his apartment.

/s/ ANDREW E. ZUARRI.

Subscribed and sworn to before me this 25th day of April, 1949.

[Seal] /s/ VAUGHN E. EVANS.

Notary Public in and for the State of Washington, residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed April 26, 1949.

[Title of District Court and Cause.]

AFFIDAVITS OF RUIS PARKER, LOTTIE MORGAN AND ROBERT D. LEE IN ANSWER TO PLAINTIFF'S AFFIDAVITS.

Comes Now the defendant, Ruis Parker, and furnishes herewith affidavits of Ruis Parker, Lottie Morgan and Robert D. Lee, in answer to the affidavits heretofore filed by the plaintiff.

/s/ ALLAN POMEROY,
Attorney for Defendant.

[Endorsed]: Filed April 28, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF RUIS PARKER

State of Washington,
County of King—ss.

Ruis Parker, being first duly sworn on oath, deposes and says: That he is the defendant in the above-entitled action, that he has read the affidavits of Robert W. Morris, Robert W. Waitt, Robert R. Musselman and Andrew E. Zuarri heretofore filed herein.

That he states on the night of November 24, 1948, he was in his apartment at 1219½ Yesler Way, Seattle, Washington, where he had been since 10 A.M. that morning, that no one had been in his apartment during the entire day and that he had not been outside of his apartment since that time, that the door to his apartment was locked during the entire day and was locked at the time the officers entered; that there is only one key in existence for this lock of which this affiant has cognizance and that is the key which was in his possession at all times; that regardless of what may be usual in apartment houses, the outside door of this apartment wing is always locked, there being only two apartments inside of this door to the wing.

That when this affiant was awakened by Capt. Morris and the other officers, Capt. Morris exhibited to this affiant his badge and stated he was an officer. That this affiant said, "there it is", meaning the opium and smoking equipment, since this opium

and smoking equipment were in plain sight on the bed. The officers then found some ash or Yen Shee. That Capt. Morris asked this affiant if there was any more opium in the apartment and stated to this affiant that if this affiant would tell him where any other opium was, it would not be necessary to tear up the apartment to look for it. This affiant was then handcuffed and with his hands behind him, led into the front room of the apartment where he was seated, and the officers then proceeded to tear up the apartment looking for more opium. Thereupon Capt. Morris came into the room and told this affiant to get dressed and Capt. Morris said to this affiant, "Is this all the Opium," to which this affiant replied, "Yes," whereupon Capt. Morris said, "It isn't according to the information we have."

Any allegations made by the officers in their affidavits contrary to the facts in this affidavit are hereby denied by this affiant.

Further affiant sayeth not.

/s/ RUIS PARKER.

Subscribed And Sworn To before me this 27th day of April, 1949.

[Seal] /s/ MARIAN M. PARKS,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed April 28, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF LOTTIE MORGAN

State of Washington,
County of King—ss.

Lottie Morgan, being first duly sworn on oath, deposes and says: That she is a tenant in the Lee Apartments, located at 1219½ Yesler Way, Seattle, Washington; that she occupies an apartment beneath the apartment of Ruis Parker; that these two apartments are the only apartments in one wing of said apartment house; that the outside door leading to these two apartments is always locked and has been so locked for more than ten years.

/s/ MISS LOTTIE MORGAN.

Subscribed And Sworn To Before Me this 26th day of April, 1949.

[Seal] /s/ MARIAN M. PARKS,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed April 28, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT D. LEE

State of Washington,
County of King—ss.

Robert D. Lee, being first duly sworn on oath, deposes and says: That he is the owner of the Lee Apartments, located at 1219½ Yesler Way, Seattle, Washington, that he has owned the property since 1945, and that the outside door leading to the apartments occupied by Ruis Parker and Lottie Morgan is always kept locked, and has been so locked at all times since he has owned said property.

/s/ ROBERT D. LEE.

Subscribed And Sworn To before me this 26th day of April, 1949.

[Seal] /s/ MARIAN M. PARKS,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed April 28, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT W. MORRIS, HENRY L. GIORDANO AND JOSEPH E. GOODE.

Comes now the plaintiff United States of America and furnishes herewith affidavits of Robert W. Morris, Henry L. Giordano and Joseph E. Goode in opposition to the Defendant's Motion to Suppress Evidence.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ VAUGHAN E. EVANS,
Assistant U. S. Attorney.

AFFIDAVIT OF ROBERT MORRIS

United States of America,
Western District of Washington,
Northern Division—ss.

Robert W. Morris, being first duly sworn, on oath deposes and says:

That he has read the affidavit of Ruis Parker dated April 27, 1949.

That on the night of November 24, 1948, the front door of the Apartment House located at 1219½ Yesler Way was unlocked, and the door leading to the apartment occupied by Ruis Parker was not only unlocked, but was open approximately one foot.

That he specifically denies having said "It isn't

according to the information we have" and further specifically denies that any one of the officers who accompanied him made any such statement, or had cause to make any such statement.

That he had never heard of Ruis Parker prior to November 24, 1948, at the time he arrested him.

/s/ ROBERT W. MORRIS.

Subscribed and sworn to before me this 29th day day of April, 1949.

[Seal] /s/ VAUGHN E. EVANS,
Notary Public in and for the State of Washington,
residing at Seattle.

AFFIDAVIT OF HENRY L. GIORDANO AND JOSEPH E. GOODE

United States of America,
Western District of Washington,
Northern Division—ss.

Henry L. Giordano and Joseph E. Goode both being first duly sworn, upon oath depose and say:

That they are Agents of the Federal Bureau of Narcotics.

That on April 28, 1949, we interviewed Robert D. Lee who executed the affidavit dated April 26, 1949 in support of the motion of Ruis Parker to suppress evidence. That Robert D. Lee stated to us that what he meant by the statement in his affidavit that the door leading to the apartments at 1219½ Yesler Way was "locked at all times," is that it is customary for that door to be locked.

That Mr. Robert D. Lee further stated that the lock is of the type which has a spring latch that operates by turning a knob from the inside and a key from the outside, that this latch can be held in the unlocked position by pressing a catch on the lock, which would cause the latch to remain in the unlocked position, that there is no automatic closing device on the door but that it must be pulled shut in order to be locked.

That Mr. Robert D. Lee showed us the lock on his door which he stated to be of the same type as on the door at 1219½ Yesler Way. That Mr. Robert D. Lee does not live in the Apartment house at that address, but that he lives at 1635 King Street.

We have checked the records of the office of Justice of the Peace Guy B. Knott, of the City of Seattle, and find that Ruis Parker has been convicted Nine (9) times for the offense of possessing liquor with intent to sell the same, the dates and disposition of the said convictions being listed as follows:

Feb. 2, 1940: Fined $150.00 and costs and sentenced to 30 days, jail sentence suspended.

Feb. 13, 1940: Fined $100.00 and costs.

March 21, 1940: Fined $100.00 and costs.

April 12, 1940: Fined $100.00 and costs.

April 12, 1940: (two separate cases on this date): Fined $100.00 and costs.

July 16, 1940: Fined $150.00 and costs.

Sept. 20, 1940: Fined $125.00 and costs.

Feb. 25, 1941: Fined $100.00 and costs.

May 28, 1943: Fined $250.00 and costs and sentenced to 90 days, jail sentence suspended.

/s/ HENRY L. GIORDANO.

/s/ JOSEPH E. GOODE.

Subscribed and sworn to before me this 28th day of April, 1949.

[Seal] /s/ VAUGHN E. EVANS,
Notary Public in and for the State of Washington, residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed April 30, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE R. MOSLER

State of Washington,
County of King—ss.

George R. Mosler, being first duly sworn on oath, deposes and says: That he is a practicing attorney in the City of Seattle; that he has been familiar with the premises known as 1219½ Yesler Way, Seattle, Washington, since 1930. During that time he or his family have owned said apartments until he sold said apartments to Robert D. Lee in September, 1945.

That during the period from 1930 to September, 1945, the outside door to the apartments located in the wing in which Ruis Parker's apartment is situated, has been customarily locked at all times and the only persons having an authorized key to said door are the two tenants in the said wing and the landlord.

Further Affiant Sayeth Not.

/s/ GEORGE R. MOSLER.

Subscribed And Sworn To before me this 30th day of April, 1949.

[Seal] /s/ MARION M. PARKS,
Notary Public in and for the State of Washington, residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed May 2, 1949.

[Title of District Court and Cause.]

PRAECIPE FOR SUBPOENA IN A CASE

The Clerk of said Court will issue Subpoena for the following-named persons to appear before said Court, at the United States Court Rooms, 1017 U. S. Court House, Seattle, at 10 o'clock, a. m., on the 5th day of May, 1949, then and there to testify in behalf of the United States.

Robert W. Morris, Detective Captain, Police Dept., Seattle.

Andrew E. Zuarri, Detective, Police Dept., Seattle.

~~Robert W. Waitt, Detective, Police Dept., Seattle.~~

E. F. Ivey, Detective, Police Dept., Seattle.

Robert R Musselman, Detective, Police Dept., Seattle.

Hugo Ringstrom, Government Chemist, Federal Office Bldg., Seattle.

F. O'Leary, Police Property Clerk, Police Dept., Seattle.

This 4th day of May, 1949.

J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed May 4, 1949.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO SUPPRESS

This matter having come on duly and regularly for hearing upon the motion of the defendant Ruis Parker for an order suppressing evidence, the plaintiff being represented by J. Charles Dennis, United States Attorney for the Western District of Washington, and Vaughn E. Evans, Assistant United States Attorney for said district, and the defendant

being represented by his counsel, Allan Pomeroy, and the Court having considered the pleadings and affidavits herein filed and having heard the arguments of counsel, the Court finds from the evidence that the police officers who seized the narcotics from the home of the defendant Ruis Parker were acting upon an emergency and had no knowledge or suspicion of any violation of the Federal Narcotic Laws nor any reason for securing a search warrant until the narcotics were discovered in the defendant's possession during the course of the police officers' investigation of an emergency; now, therefore, it is hereby

Ordered, Adjudged And Decreed that the motion of the defendant Ruis Parker for an order to suppress evidence be and the same is hereby denied in all respects.

The defendant is allowed an exception to the findings of the Court and the ruling upon the motion herein entered.

Done In Open Court this 6th day of May, 1945.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ VAUGHN E. EVANS,
Asst. U. S. Attorney.

[Endorsed]: Filed May 6, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To Robert W. Waitt, Detective, Police Department, Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seatle, in said district, on the 5th day of May A. D. 1949, at 10 o'clock A. M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States, this

4th day of May, A. D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received May 4, 1949, United States Marshal, Seattle, Wash.

Western District
of Washington—ss.

I hereby certify and return, that on the 4th day of May, 1949, I received the within Subpoena and that after diligent search I am unable to find the within-named defendant Robert W. Waitt within my district.

J. S. DENISE,
United States Marshal.

By /s/ JAMES M. SCHWENFIELD,
Deputy United States
Marshal.

N. B., Waitt is in San Franciscon on the Rich case.

[Endorsed]: Filed May 12, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To Robert R. Musselman, Detective, Police Department, Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seatle, in said district, on the 5th day of May A. D. 1949, at 10 o'clock A. M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States, this 4th day of May, A. D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received May 4, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington, on May 4, 1949, and on May 4, 1949, at Seattle, Washington, I served it on the within-named Robert P. Musselman and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES M. SCHWENFIELD,
Deputy.

[Endorsed]: Filed May 12, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To Robert W. Morris, Detective Captain, Police Department, Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seatle, in said district, on the 5th day of May A. D. 1949, at 10 o'clock A. M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States, this

4th day of May, A. D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received May 4, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington, on May 4, 1949, and on May 4, 1949, at Seattle, Washington, I served it on the within-named Robert W. Morris and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES M. SCHWENFIELD,
Deputy.

[Endorsed]: Filed May 12, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To Andrew E. Zuarri, Detective Police Department,
Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seatle, in said district, on the 5th day of May A. D. 1949, at 10 o'clock A. M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States. this 4th day of May, A. D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received May 4, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington, on May 4, 1949, and on May 4, 1949, at Seattle, Washington, I served it on the within-named Andrew E. Zuarri and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES M. SCHWENFIELD,
Deputy.

[Endorsed]: Filed May 12, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To Hugo Ringstrom, Government Chemist, Federal Office Building, Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seatle, in said district, on the 5th day of May A. D. 1949, at 10 o'clock A. M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States, this

4th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received May 4, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington, on May 4, 1949, and on May 4, 1949, at Seattle, Washington, I served it on the within-named Hugo Ringstrom and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES M. SCHWENFIELD,
Deputy.

[Endorsed]: Filed May 12, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To F. O'Leary, Police Property Clerk, Police Department, Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and

appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seatle, in said district, on the 5th day of May A. D. 1949, at 10 o'clock A. M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States, this 4th day of May, A. D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received May 4, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington, on May 4, 1949, and on May 4, 1949, at Seattle, Washington, I served it on the within-named F. O'Leary and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES M. SCHWENFIELD,
Deputy.

[Endorsed]: Filed May 12, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To Robert W. Waitt, 13219-1st Ave., S.W., Seattle, Wash.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seatle, in said district, on the 23rd day of May A. D., 1949, at 11:00 o'clock A. M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States, this 19th day of May, A. D., 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By JACK W. KOERNER,
Deputy Clerk.

U. S. Marshal's Criminal Docket No. 27885.

Received May 19, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington, on May 19, 1949, and on May 19, 1949, at 13219-1st, S.W., Seattle, Washington, I served it on the within-named..........and left a true copy there or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES BRIDGES,
Deputy.

[Endorsed]: Filed May 23, 1949.

[Title of District Court and Cause.]

PRAECIPE FOR SUBPOENA IN A CASE

The Clerk of said Court will issue Subpoena for the following-named persons to appear before said Court, at the United States Court Rooms, 1017 U.S. Court House in Seattle at 10 o'clock, a.m., on the 2d day of August, 1949, then and there to testify in behalf of the United States.

Robert W. Morris, Detective Captain, Police Dept., Seattle.

Andrew E. Zuarri, Detective, Police Dept., Seattle.

Robert W. Waitt, Detective, Police Dept., Seattle.

Robert R. Musselman, Detective, Police Dept., Seattle.

Hugo Ringstrom, Government Chemist, Federal Office Bldg., Seattle.

Frank O'Leary, Police Property Clerk, Police Dept., Seattle.

This 25th day of May, 1949.

J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed May 25, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To: Andrew E. Zuarri, Detective, Police Department, Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seattle, in said district, on the 2d day of August A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States, this

26th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received May 26, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington on May 26, 1949 and on May 27, 1949 at Seattle, Washington, I served it on the within-named Andrew E. Zuarri and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES BRIDGES,
Deputy.

[Endorsed]: Filed May 31, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To: Robert W. Morris, Detective Captain, Police Department, Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the

Courthouse, in the city of Seattle, in said district, on the 2d day of August A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States, this 26th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received May 26, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington on May 26, 1949 and on May 27, 1949 at Seattle, Washington, I served it on the within-named Robert W. Morris and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES BRIDGES,
Deputy.

[Endorsed]: Filed May 31, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To: Robert R. Musselman, Detective, Police Department, Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seattle, in said district, on the 2d day of August A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States, this 26th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received May 26, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington on May 26, 1949 and on May 27, 1949 at Seattle, Washington, I served it on the within-named Robert R. Musselman and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES BRIDGES,
Deputy.

[Endorsed]: Filed May 31, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To: Hugo Ringstrom, Government Chemist, Federal Office Building, Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seattle, in said district, on the 2d day of August A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States, this

26th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

RETURN ON SERVICE

Received this writ at Seattle, Washington on May 26, 1949 and on May 27, 1949 at Seattle, Washington, I served it on the within-named Hugo Ringstrom and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES BRIDGES,
Deputy.

Received May 26, 1949, United States Marshal, Seattle, Wash.

[Endorsed]: Filed May 31, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To: Frank O'Leary, Police Property Clerk, Police Department, Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the

Courthouse, in the city of Seattle, in said district, on the 2d day of August A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen Judge of said District Court of the United States, this 26th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received May 26, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington on May 26, 1949 and on May 27, 1949 at Seattle, Washington, I served it on the within-named Frank O'Leary and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES BRIDGES,
Deputy.

[Endorsed]: Filed May 31, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To: Robert W. Waitt, Detective, Police Department, Seattle, Washington.

You Are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the Western District of Washington, at the Courthouse, in the city of Seattle, in said district, on the 2d day of August A.D. 1949, at 10 o'clock A.M. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

Witness, the Honorable John C. Bowen, Judge of said District Court of the United States, this 26th day of May, A.D. 1949, and in the 173rd year of the Independence of the United States of America.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received May 26, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington on May 26, 1949 and on May 27, 1949 at Seattle, Washington, I served it on the within-named Robert W.

Waitt and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.

[Seal] By /s/ JAMES BRIDGES,
Deputy.

[Endorsed]: Filed May 31, 1949.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the Above-Entitled Court:

You will please subpoena Lottie Morgan, 1219½ Yesley, Apt. A., Seattle; Robert D. Lee, 1635 King, Seattle; William Hawker, 109 12th Ave., Seattle for 2 p.m., Aug. 3, 1949.

/s/ ALLAN POMEROY,
Attorney for Defendant.

[Endorsed]: Filed Aug. 2, 1949.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

Comes now the defendant, Ruis Parker, and waives the right to a jury trial and requests the Court to try his case without a jury.

/s/ RUIS PARKER,
Defendant.

/s/ ALLAN POMEROY,
Attorney for Defendant.

Approved and consented to by:

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN F. DORE,
Assistant United States Attorney.

The foregoing waiver of Jury Trial is hereby approved by the above-entitled court.

/s/ JOHN C. BOWEN,
Judge.

[Endorsed]: Filed Aug. 4, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the defendant, by his attorney, and most respectfully moves this honorable Court to grant a new trial for the following reasons:

1. The judgment of the Court was contrary to law.

2. The Court erred in admitting into evidence government exhibits 1, 2 and 3.

3. The Court erred in denying the defendant's petition and motion to suppress evidence.

4. For such other and further reasons as will be called to the attention of the Court upon a hearing of this motion.

/s/ ALLAN POMEROY,
Attorney for Defendant.

[Endorsed]: Filed Aug. 8, 1949.

[Title of District Court and Cause.]

DEFENDANT SUBPOENA IN A CRIMINAL CASE

To William Hawker, 109 12th Ave., Seattle, Washington.

You Are Hereby Commanded to appear before the Hon. John C. Bowen, Court Room No. 1, in the District Court of the United States for the Western District of Washington, Northern Division at the United States Court House, 5th Ave., and Spring Street, in the city of Seattle, in said District, on the 4th day of August, A.D. 1949, at 10:00 o'clock a.m. of said day, then and there to testify on behalf of the Defendant Ruis Parker in the above-entitled cause.

Witness, the Honorable John C. Bowen, Judge of the District Court of the United States for the Western District of Washington, and the seal thereof, this 2nd day of August, A.D., 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] /s/ JACK W. KOERNER,
Deputy Clerk.

Received Aug. 2, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington, on August 2, 1949 and on August 2, 1949 at Seattle, Washington, I served it on the within-named William Hawker and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.
By /s/ ARLENE B. WARD,
Deputy.

[Endorsed]: Filed Aug. 10, 1949.

[Title of District Court and Cause.]

DEFENDANT SUBPOENA IN A CRIMINAL CASE

To Lottie Morgan, 1219½ Yesler, Apt. A, Seattle, Washington.

You Are Hereby Commanded to appear before the Hon. John C. Bowen, Court Room No. 1, in the District Court of the United States for the Western District of Washington, Northern Division at the United States Court House, 5th Ave., and Spring Street, in the city of Seattle, in said District, on the 4th day of August, A.D. 1949, at 10:00 o'clock a.m. of said day, then and there to testify on behalf of the Defendant Ruis Parker in the above-entitled cause.

Witness, the Honorable John C. Bowen, Judge of the District Court of the United States for the Western District of Washington, and the seal thereof, this 2nd day of August, A.D. 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] /s/ JACK W. KOERNER,
Deputy Clerk.

Received Aug. 2, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington, on August 2, 1949 and on August 2, 1949 at Seattle, Washington, I served it on the within-named Lottie Morgan and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.
By /s/ EDWARD C. SEALLY,
Deputy.

[Endorsed]: Filed Aug. 10, 1949.

[Title of District Court and Cause.]

DEFENDANT SUBPOENA IN A CRIMINAL CASE

To Robert D. Lee, 1635 King, Seattle, Washington.

You Are Hereby Commanded to appear before the Hon. John C. Bowen, Court Room No. 1, in the District Court of the United States for the Western District of Washington, Northern Division at the United States Court House, 5th Ave., and Spring Street, in the city of Seattle, in said District, on the 4th day of August, A.D. 1949, at 10:00 o'clock a.m. of said day, then and there to testify on behalf of the Defendant Ruis Parker in the above-entitled cause.

Witness, the Honorable John C. Bowen, Judge of the District Court of the United States for the

Western District of Washington, and the seal thereof, this 2nd day of August, A.D. 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] /s/ JACK W. KOERNER,
Deputy Clerk.

Received Aug. 2, 1949, United States Marshal, Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washnigton, on August 2, 1949 and on August 2, 1949 at Seattle, Washington, I served it on the within-named Robert D. Lee and left a true copy thereof or a subpena ticket with the person named above.

J. S. DENISE,
U. S. Marshal.
By /s/ EDWARD C. SEALLY,
Deputy.

[Endorsed]: Filed Aug. 10, 1949.

United States District Court, Western District of Washington, Northern Division

No. 47756

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RUIS PARKER,
Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

On this 12th day of August, 1949, the attorney for the Government and the defendant Ruis Parker, appearing in person, the defendant being represented by Allan Pomeroy, his attorney, the Court finds the following:

That prior to entering his plea, a copy of the indictment was given the defendant, and that the defendant entered a plea of Not Guilty and a trial was held before the Court without a jury, the defendant having waived a jury trial in writing, with the approval of the Court and consent of the Government, the trial resulting in a decision by the Court that the defendant is Guilty as to Count I of the Indictment; that by order if this Court the presentence investigation was dispensed with; Now, therefore,

It Is Adjudged that the defendant has been convicted by a decision of the Court of the offense of violation of Section 174, Title 21, U.S.C., as charged in Count I of the indictment, there being only one count in the indictment herein; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged in Count I of the indictment, and is convicted.

It Is Adjudged and Ordered that the defendant be committed to the custody of the Attorney General of the United States for confinement in the Federal Prison Camp, McNeil Island, Washington, or such other like institution as the Attorney General of the United States or his authorized representative may by law designate for the period of Ten (10) Months on Count I of the indictment, and further, that defendant pay a fine in the sum of One ($1.00) Dollar, and shall stand committed until such fine is paid.

It Is Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 12th day of August, 1949.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ JOHN F. DORE,
Asst. U. S. Attorney.

Violation of Section 174, Title 21, U.S.C.

(Narcotic Drugs Import & Export Act, Possession of Opium prepared for smoking and Yen Shee.)

Filed and Entered: Aug. 12, 1949.

[Endorsed]: Filed and Eentered: Aug. 12, 1949.

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

Know All Men by These Presents:

That we, Ruis Parker, as principal, and United Pacific Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, as surety, are held and firmly bound unto the United States Government in the penal sum of One Thousand Dollars ($1000) for the payment of which sum, well and truly to be made, we bind and obligate ourselves and each of us, our heirs, executors and administrators, jointly and severally firmly by these presents.

Signed and sealed this 12th day of August, 1949.

The condition of the foregoing obligation is such that whereas the above-named principal was convicted under Count I of Section 174—Title 21 U.S.C. Narcotics, on the 4th day of August, 1949, and thereafter filed a motion for a new trial, which matter came on for hearing thereafter and was by the Court overruled, and thereafter was sentenced on Friday, August 12th, 1949, to serve Ten Months in the United States Road Camp at McNeil Island and pay a fine of One Dollar.

Now, if the said Ruis Parker shall well and truly make his personal appearance before the United States District Court, for the Western District of Washington, Northern Division, until discharge by due course of the law, then and there to answer the charge and accusation against him, this obligation

shall become void, otherwise to remain in full force, virtue and effect.

/s/ RUIS PARKER,
Principal.
UNITED PACIFIC INSURANCE COMPANY

[Seal] By /s/ B. REFSLAND,
Attorney-in-Fact.

The foregoing bond approved on this 12th day of August, 1949.

/s/ JOHN C. BOWEN,
Judge.

Approved as to Form:

/s/ JOHN F. DORE,
U. S. District Attorney.

Bond approved:

/s/ J. CHARLES DENNIS,
U. S. Attorney.

[Endorsed]: Filed Aug. 12, 1949.

Mr. Paul P. O'Brien August 20, 1949.
Clerk, U. S. Court of Appeals
P. O. Box #547
San Francisco, California

Re USA vs. Ruis Parker

Criminal No. 47756

Dear Mr. O'Brien:

Pursuant to Rule 37(1) of the Federal Rules of Criminal Procedure, we are forwarding the usual

Statement of Docket Entries together with duplicate Notice of Appeal in the above-entitled cause.

Yours very truly,

MILLARD P. THOMAS,
Clerk.

---

308 U S Court House

Hon. J. Charles Dennis, August 19, 1949.
United States Attorney
1017 U. S. Court House
Seattle 4, Washington

Dear Mr. Dennis:

Please find enclosed herewith pursuant to Rule 37 (a)(1) as amended, of the Criminal Rules of Procedure, one copy of a Notice of Appeal filed today in Cause No. 47756, U. S. vs. Ruis Parker.

Yours very truly,

MILLARD P. THOMAS,
Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Ruis Parker, 1219½ Yesler Way, Apt. B, Seattle, Wash.

Name and address of Appellant's attorney: Allan Pomeroy, 304 Spring Street, Seattle, Wash.

Offense: Violation of Section 174, Title 21, U.S.C.

Judgment and Sentence:

There being only 1 count, Appellant was sentenced to the Federal Prison Camp, McNeil Island, Washington, for a period of ten months and to pay a fine of $1.00 and stand committed until said fine was paid.

The Appellant is now on bail.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the above-stated judgment on the grounds set forth below.

/s/ RUIS PARKER,
Appellant.

/s/ ALLAN POMEROY,
Attorney for Appellant.

Dated: August 18, 1949.

Grounds of Appeal

1. The Court erred in denying defendant's petition to suppress.

2. The Court erred in denying defendant's motion to dismiss.

[Endorsed]: Filed Aug. 19, 1949.

[Title of District Court and Cause.]

Seattle, Washington, August 4, 1949

Before: Honorable John C. Bowen,
District Judge.

EXCERPTS OF TESTIMONY

CAPTAIN ROBERT W. MORRIS

called as a witness by and on behalf of the plain-

tiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Dore:

Q. What did you do as you went into the room?

A. Well, I called out "is anybody home?" Nobody answered. I called out three or four times when I walked through the living room. I walked into the living room and then into the dining room. I called out, "Anybody home?" And nobody answered and then I went ahead.

Q. What did you see?

A. When I got into the dining room, on the left there was a door that was shut. So I went over and opened that door. I called out, "Is anybody home?" And then I saw the defendant lying there on a bed unconscious,—or his eyes were shut, anyway.

* * *

ROBERT W. WAITT

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Dore:

Q. And then what happened after you got into the apartment?

A. We entered into what was apparently a living room. It was a pretty good size room. And then we walked straight on back towards the dining room and he called out again, "Is there anybody home?"—or "Is there anybody here," or words to that effect. He got back into the dining room and there was a door—there was a door to our left—and he opened that door and I went in there with him.

Q. And what was in there?

A. There was a bedroom.

Q. And what did you see in there?

A. There was a small light on over a nightstand that was sitting by the head of the bed and there was a man laying on the bed.

Q. Do you see that man in court today?

A. Yes.

Q. Can you point him out?

A. He is the defendant in the case (indicating).

United States District Court, Western District of Washington, Northern Division

No. 47756

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUIS PARKER,

Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

On this 12th day of August, 1949, the attorney

for the Government and the defendant Ruis Parker appearing in person, the defendant being represented by Allan Pomeroy, his attorney, the Court finds the following:

That prior to entering his plea, a copy of the indictment was given the defendant, and that the defendant entered a plea of Not Guilty and a trial was held before the Court without a jury, the defendant having waived a jury trial in writing, with the approval of the Court and consent of the Government, the trial resulting in a decision by the Court that the defendant is Guilty as to Count I of the Indictment; that by order of this Court the presentence investigation was dispensed with; Now, therefore,

It Is Adjudged that the defendant has been convicted by a decision of the Court of the offense of violation of Section 174, Title 21, U.S.C., as charged in Count I of the indictment, there being only one count in the indictment herein; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged in Count I of the indictment, and is convicted.

It Is Adjudged and Ordered that the defendant be committed to the custody of the Attorney General of the United States for confinement in the Federal Prison Camp, McNeil Island, Washing-

ton, or such other like institution as the Attorney General of the United States or his authorized representative may by law designate for the period of Ten (10) Months on Count I of the indictment, and further, that defendant pay a fine in the sum of One ($1.00) Dollar, and shall stand committed until such fine is paid.

It Is Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 12th day of August, 1949.

JOHN C. BOWEN,
U. S. District Judge.

Presented by:

JOHN F. DORE,
Asst. U. S. Attorney.

Violation of Section 174, Title 21, U.S.C.

(Narcotic Drugs Import & Export Act, Possession of Opium prepared for smoking and Yen Shee.)

Office of the Clerk, U.S. Court of Appeals
For the Ninth Circuit, San Francisco 1, Calif.

Millard P. Thomas, Esq., August 22, 1949
Clerk, United States
District Court,
308 U.S. Court House,
Seattle (4) Wash.

Undocketed.
Parker vs. U.S.A.

Dear Sir:

I have your favor dated the 20th instant, enclosing duplicate notice of appeal and statement of docket entries in above cause.

Sincerely,

/s/ PAUL P. O'BRIEN,
Clerk.

O'B:W
cc-Allan Pomeroy;
J. Charles Dennis.

[Title of District Court and Cause.]

AFFIDAVIT OF ALLAN POMEROY IN SUPPORT OF MOTION TO EXTEND TIME FOR FILING RECORD ON APPEAL

State of Washington,
County of King—ss.

Allan Pomeroy, being first duly sworn on oath, deposes and says:

That he is the attorney for the defendant in the

above cause. Notice of appeal was filed August 18, 1949. Promptly thereafter affiant attempted to reach the court reporter who reported the testimony at the trial of this cause, but he was then on vacation and affiant did not hear from him until early September, at which time he informed affiant that it would be impossible for him to prepare a transcript of the testimony and proceedings at the trial within the forty days after filing of Notice of Appeal and that the earliest date on which he could hope to prepare such a transcript would be the latter part of September, 1949.

Affiant believes that approximately three weeks will be necessary after receipt of the transcript of testimony in order to prepare and transmit to the Circuit Court of Appeals the record on appeal. Since affiant has no guarantee that the transcript of testimony will actually be received the latter part of September, affiant believes that it is reasonably necessary that the time be extended to November 30, 1949.

/s/ ALLAN POMEROY.

Subscribed and Sworn to before me this 19th day of September, 1949.

[Seal] /s/ JOHN E. BELCHER,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Sept. 20, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL

On motion of defendant, and the Court having considered the affidavit of Allan Pomeroy in support of the Motion,

It Is Hereby Ordered that the time for filing the record on appeal in this cause in the Circuit Court of Appeals for the Ninth Circuit be, and it hereby is, extended to November 10, 1949.

Done in Open Court this 20th day of September, 1949.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ ALLAN POMEROY,
Attorney for Defendant.

OK as to form:

/s/ J. CHARLES DENNIS,
U. S. Attorney.

By /s/ JOHN F. DORE,
Asst. U. S. Attorney,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 20, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above Named Court:

In making up the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, you will please include all original papers filed therein, together with this designation of record.

Filed this 31st day of October, 1949.

ALLAN POMEROY and
ERNEST R. CLUCK,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 1, 1949.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel that the following exhibits be omitted from the original record on appeal: Plaintiff's Exhibits 1, opium set; 2, jars and tin; and 3, envelope, and that the following exhibit be included in the original record on appeal and be forwarded by the Clerk of this Court to the United States Court of Appeals for the Ninth Circuit, pursuant to Rule 39 (b) (1) and Rule 75 (o) of the Federal Rules of Civil Procedure and Rule 11 of the United States

Court of Appeals: Defendant's Exhibit A-2, Chart showing street locations.

Dated at Seattle, Washington, this 3rd day of November, 1949.

J. CHARLES DENNIS,
U. S. Attorney,
VAUGHN E. EVANS,
Asst. U. S. Attorney,
ALLAN POMEROY and
ERNEST R. CLUCK,
Attorneys for Defendant.

[Endorsed]: Filed Nov. 3, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Sub-division I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 39(b)(1) of the Federal Rules of Criminal Procedure, I am transmitting herewith as the record on appeal in the above-entitled cause, all of the original pleadings on file and of record in said cause in my office at Seattle, as set forth

below, and that said pleadings, together with the Plaintiff's Exhibits numbered 1, 2, and 3, and Defendant's Exhibit numbered A-2, constitute the record on appeal from the Judgment filed and entered August 12, 1949, to the United States Court of Appeals at San Francisco, California, to wit:

1. Indictment.

2. Court Reporter's Transcript of Arraignment and Plea.

3. Motion to Suppress Evidence.

4. Petition in Support of Motion to Suppress.

5. Affidavits of Robert W. Morris, Robert W. Waitt, Robert R. Musselman and Andrew E. Zuarri.

6. Affidavits of Ruis Parker, Lottie Morgan and Robert D. Lee, in answer to Plaintiff's Affidavits.

7. Affidavits of Robert W. Morris, Henry L. Giordano and Joseph E. Goode, in opposition of Defendant's Motion to Suppress Evidence.

8. Affidavit of George R. Mosler.

9. Praecipe, Government, for Subpoena, Robert W. Morris and five.

10. Order Denying Motion to Suppress Evidence.

11. Marshal's return on Subpoena (Robert W. Waitt—not found).

12. Marshal's return on Subpoena, Robert R. Musselman and four.

13. Marshal's return on Subpoena (Robert W. Waitt).

14. Praecipe for Subpoena, Robert W. Morris and five.

15. Marshal's return on Subpoena, Andrew E. Zuarri and five.

16. Defendant's Praecipe for Subpoena, Lottie Morgan and two.

17. Waiver of Jury Trial.

18. Defendant's Motion for New Trial.

19. Marshal's return on Subpoena, William Hawker and two.

20. Judgment, Sentence and Commitment.

21. Bond, Defendant, $1000—U.P.I. Co.

22. Notice of Appeal.

22a. Court Reporter's Transcript of Excerpts of Testimony (Robert W. Morris and Robert W. Waitt).

23. Affidavit of Allan Pomeroy in Support of Motion to Extend Time for Filing Record on Appeal.

24. Order extending time for Filing Record on Appeal to November 10, 1949.

25. Court Reporter's original Transcript of Testimony and Proceedings at Trial.

26. Designation of Record on Appeal.

27. Stipulation directing Clerk not to Transmit certain original exhibits to Court of Appeals.

Plaintiff's Exhibits numbered 1, 2, and 3 are not forwarded with this Record on Appeal, pursuant to Stipulation of Counsel.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 4th day of November, 1949.

MILLARD P. THOMAS,
Clerk,

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 47756

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RUIS PARKER,
Defendant.

PROCEEDINGS

Be It Remembered, that on the 4th day of August, 1949, at the hour of 10:15 a.m., the above entitled and numbered cause came on for trial before the Honorable John C. Bowen, District Judge, in the City of Seattle, County of King, State of Washington; the plaintiff appearing by its attorney, John

F. Dore, Esq., and the defendant appearing by his attorney, Allan Pomeroy, Esq.

Both sides having announced they were ready for trial, and having agreed to waiver of jury trial, the following proceedings were had and testimony given, to-wit: [2*]

The Court: May I ask if counsel and the parties are ready to proceed with the trial of the case of the United States of America versus Ruis Parker, Defendant?

Mr. Pomeroy: The defendant is ready, Your Honor.

Mr. Dore: The government is ready, Your Honor.

The Court: The plaintiff may now proceed.

Mr. Dore: The plaintiff will call as its first witness Robert W. Morris.

The Court: Come forward and be sworn.

Mr. Pomeroy: At this time, if Your Honor please, I wish the court record to show that the defendant renews his motion to suppress evidence in this case, which was previously denied by the Court, such motion to be of record in this particular proceedings from the beginning to the end. Another thing I am asking for is the exclusion of all witnesses during the trial of this case.

The Court: The motion to suppress is denied. What has the government to say, if anything, regarding the request for exclusion of witnesses?

Mr. Dore: The government has no objection, Your Honor, to the exclusion of witnesses.

*** Page numbering appearing at bottom of page of original Reporter's Transcript.**

The Court: Is there any exception which the government wishes made as to any witness whom possibly the defendant has no objection to, that such witness [3] remain in attendance?

Mr. Dore: No, Your Honor; I do not think the government will request any?

The Court: All witnesses in this case, except the one who is now before the Court for the purpose of being sworn, will kindly retire to the waiting room and await your further call to the witness stand—all the witnesses, both those for the plaintiff and those for the defendant.

The witness Morris will now be sworn.

ROBERT W. MORRIS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dore:

Q. Would you state your full name, please?

A. Robert W. Morris.

Q. How do you spell your last name?

A. M-o-r-r-i-s.

Q. Where do you live?

A. 3630 Magnolia Boulevard.

Q. And what is your business or occupation?

A. Captain of the Seattle Police Department.

(Testimony of Robert W. Morris.)

Q. How long have you been with the Seattle Police Department? [4] A. 17 years.

Q. And with what detail are you now connected?

A. Felony squad, and the supervising captain of the night shift, detective division.

Q. Were you so employed by the Seattle Police Department on or about November the 24th, 1948?

A. I was.

Q. And were you on duty as a police officer on that date? A. I was.

Q. In what capacity at that time?

A. Well, it was as supervising captain of the night shift and captain of the felony squad.

Q. And speaking of the night shift, what do you mean by that?

A. Well, it takes everything in, the Detective Division, the Homicide Division—robbery.

Q. Between what hours?

A. Eight o'clock in the evening to four in the morning.

Q. You received an anonymous—did you receive an anonymous telephone call on the 24th of November?

Mr. Pomeroy: I object to that as leading, if Your Honor please.

The Court: Try and avoid leading.

Mr. Dore: Yes, Your Honor. [5]

The Court: Ask him what, if anything, he did.

Q. (By Mr. Dore): While you were on duty

(Testimony of Robert W. Morris.)

that evening, November 24th, did you receive a telephone call? A. I did.

Q. And what was the nature of that call?

A. I received a call from somebody on the phone, and they said that I better get up to this address which I believe is 1219½ Yesler, Apartment B, that a man up there looked like he was poisoned and in bad shape and somebody better get up there in a hurry. I tried to find out who the man was or where he was. He wouldn't tell me. He said, "You get up here and I will be here."

Q. About what time of evening was this?

A. About 9:30.

Q. Did you at that time endeavor to ascertain the identification of the caller?

A. Yes. I tried to talk around and find out who it was. The fellow wouldn't say who he was.

Q. Did you recognize the voice at all, Captain?

A. I did not.

Q. Now, who was present at the time you received the telephone call?

A. The witnesses in this case were all present, Zuarri, Waitt, Musselman, and Ivy. That was all.

Q. Are they all police officers on your shift? [6]

A. They are.

Q. Now, what did you do in response to the call?

A. We were just getting ready to go out the door on another case. We were just getting ready to leave when I got the call, so I told them to come up and meet me at 12th and Yesler.

(Testimony of Robert W. Morris.)

Q. Whom did you tell that to?

A. Everybody there. We were going on something else and I didn't have time to finish whatever I was talking about. I said to come up to about 12th and Jackson. From there we were going out on this other case.

Q. What did you think or believe at that time concerning this call?

Mr. Pomeroy: I object to that, if Your Honor please, what he thought or believed. It has nothing to do with this case.

The Court: I am not aware at the moment of what right you would have to produce testimony as to what was in one's mind.

Mr. Dore: Well, as to an offer of proof, Your Honor, I ask this question in the way of showing the state of mind of the police officer; what was his belief at the time he was proceeding to the residence of this defendant.

The Court: You mean with respect to the question [7] of probable cause?

Mr. Dore: Yes, Your Honor.

The Court: Well, I believe that it ought to be framed in a different way. You could limit the inquiry to certain aspects, that is, as to the question of probable cause, or as to there being committed any offense, and so forth—what effect did this have upon you, or something to limit it to a specific inquiry.

(Testimony of Robert W. Morris.)

Q. (By Mr. Dore): Did you at that time believe that a crime had been committed at that address?

A. I believed that somebody was in bad shape, that they were sick and needed some police help or assistance. I asked the fellow: "What was the——"

Mr. Pomeroy: I will object to this, if Your Honor please?

Q. What do you mean by "in bad shape"?

Mr. Pomeroy: Just a minute. I am making an objection. It is hearsay.

A. The fellow said——

The Court: Just a moment.

Objection sustained.

Q. (By Mr. Dore): Captain, you stated prior to the objection that you thought the man was in bad shape. What do you mean by "bad shape"?

Mr. Pomeroy: I object to that, if Your Honor please, as not being pertinent to the issues of this case, the state of his mind.

Mr. Dore: Your Honor, I submit that he can explain the phrase.

The Court: The objection is overruled. You may state what you mean by "bad shape."

A. The man said——

The Court: You cannot state what the man said. What did you mean? What did you mean just now by using the words "bad shape"?

The Witness: I thought he was dying or poisoned.

(Testimony of Robert W. Morris.)

Q. (By Mr. Dore): Now, when did you arrive at 1219½ Yesler, Captain?

A. I drove up there immediately. I got there in two or three minutes.

Q. Two or three minutes. And what time approximately did you leave the police station?

A. 9:30.

Q. Now, who was with you?

A. I went up in the car by myself. The other fellows went up in their cars.

Q. And who did you meet at 12th and Yesler?

A. Zuarri, Waitt, Musselman and Ivy.

Q. And what did you do after the meeting with them? [9]

A. Well, I told two of them to go with me. I told Waitt and Musselman to come with me and the others to stay outside. I told them that until we found out what it was all about so we didn't look like a bunch of policemen climbing up the stairs.

Q. What did you then do?

A. I took Musselman and Waitt and went upstairs. I thought there would be a man at the door. There was nobody there, so I went ahead and entered the door.

Q. Now, you say you entered the door. Would you describe to the Court briefly the general physical layout of the apartment or residence?

A. It is a 2-story building, apartment, duplex, something like that, and down at the left hand corner

(Testimony of Robert W. Morris.)

at the front there is a door. You go in there. And then we went to the second floor where there is a door to Apartment B.

Q. Now, you say you went in the door. Do you mean by that you went in the door on the first floor?

A. That is right.

Q. Was that door open or closed?

A. It was closed, but not locked.

Q. Now, what did you do after you entered the doorway there?

A. I didn't see anybody, so I walked upstairs.

Q. And what did you do after going upstairs?

A. Well, when I got to the top of the stairway, I saw a door open there. This door was open,—oh, about eight inches or a foot, so I went in the room.

Q. What did you do as you went into the room?

A. Well, I called out, "Is anybody home?" Nobody answered. I called out three or four times when I walked through the living room. I walked into the living room and then into the din*n*ing room. I called out, "Anybody home?" And nobody answered and then I went ahead.

Q. What did you see?

A. When I got into the din*n*ing room, on the left there was a door that was shut. So I went over and opened that door. I called out, "Is anybody home?" And then I saw the defendant lying there on a bed unconscious,—or his eyes were shut, anyway.

Q. And what else did you see and hear at that time, or do?

(Testimony of Robert W. Morris.)

A. Well, I looked at him and he opened his eyes. I said, "What seems to be the trouble?" And he opened his eyes and smiled at me and said, "There it is." I said, "There what is?" He said, "There it is." I said, "There what is?" The light—there was a weak light in the room, and there was a dark red bedspread on the bed, and at first I couldn't see well. Then I could see down there and there was an opium layout. When I [11] looked down there, I said, "By golly, it is opium."

I told him I was Captain Morris. He said, "Yes, I know." I said, "You are under arrest. Get your clothes on." We took him out in the other room and handcuffed him.

Q. Now, in regard to the man you saw on the bed, do you see him in court here today?

A. It is the defendant, Ruis Parker.

Q. Seated next to Mr. Pomeroy?

A. Yes, sir.

Q. Are you positive of that identification?

A. Yes, sir.

Q. Now, after you placed him under arrest, where did you take him?

A. I sat him out in the front room.

Q. And then what happened?

A. I called the other fellows—I don't remember whether I called them or sent somebody else out. I think I yelled out the window. I told the other fellows to come up and search the apartment.

Q. Now, when you speak of the apartment, could

(Testimony of Robert W. Morris.)
you describe to the Court the layout of the apartment, the number of rooms to the apartment?

A. There is a front room, a din*n*ing room and a kitchen. As you go into the din*n*ing room, to your left there is [12] a bedroom, and then you go through that bedroom into a bathroom. The bathroom also goes around in a circle back into the kitchen.

Q. And that is all part of one apartment, is it?

A. That is the top floor of that building.

Q. Does it have a number or letter designating it?

A. It is Apartment B. I don't know whether it is on the door or not.

Q. Now, you say that you took him into the other room. When you took him in the other room and he was seated there, what did you do after that?

A. I talked to him a little bit while the fellows were looking around the place.

Q. What did he have to say to you at that time?

A. Well, I asked him—I just talked along. It was a very pleasant conversation. He was a little woozy. I asked him if he wanted us to help him. He said, "No." I asked him if he had any more opium around the place. He said, "No; that is all," that was right there on the bed. I asked him—I knew—after he told me who he was, his name, why, I knew I had heard of him before.

Q. Yes. And did you do anything other than just talk to him while the others searched the apartment?

(Testimony of Robert W. Morris.)

A. Oh, I think once I looked around there. I checked [13] over the stuff they found on the little plate, and then I think I looked around the din*n*ing room myself one time. We were there about 20 minutes, or something like that.

Mr. Dore: Your Honor, may I have this marked Plaintiff's Exhibit 1 for identification, please? It consists of a plate and some other items.

(Items referred to marked Plaintiff's Exhibit 1 for identification.)

Q. (By Mr. Dore): Before you there, Captain, is placed Plaintiff's Exhibit 1 for identification. Can you identify any of those objects?

A. This is the collection of objects that were laying on the bed alongside of Mr. Parker.

Q. And would you enumerate of what they consist? If you know.

A. This is a home-made opium pipe with, evidently, some black residue, Yen Shee, in the bottle. That is the way they make them. There are the jars the opium comes in. There were seven or eight empty jars there, but there are only two of them here.

Here is the knife. This is what they call a yen hok, or something.

Q. That needle like object?

A. Yes. They take the opium out of the jar with this [14] and cook it over the flame and then shove it over this little hole in the bottle.

(Testimony of Robert W. Morris.)

This is a vasoline jar that he had olive oil in, or something to make a little flame to cook the opium with.

Q. Are there any other objects there?

A. Here are scissors and a piece of cotton.

Q. How about the plate, Captain?

A. The plate was laying there on the bed. Here is—this was over the lamp like this. (Referring to a small lamp shade.)

Q. What is that made of, Captain?

A. This is made of cardboard. You can't see the flame. Probably that is why I couldn't see the flame. You put oil in here and light this string and then they put this over it.

Q. It is in the nature of a shade, is it?

A. It is to keep the flame from probably going all over,—concentrate the flame.

Q. Now, all of those items you identified there, were they present in the bedroom next to the defendant when you saw them? A. They were.

Q. Was there any aroma of opium in the room?

A. Well, I don't smell the stuff very good. I could [15] smell it after I saw it, but I didn't smell it ahead of time.

Q. And what was the condition of the pipe when you found it as to warmth or coldness?

A. The flame was burning at the time when he showed it to me, and I think the pipe was laying on the plate. I don't know. It was right there some place.

(Testimony of Robert W. Morris.)

Q. Now what was his physical condition at the time? A. Groggy.

Q. Did you find anything else in the apartment, you, personally?

A. Just some bottles of opium and stuff. There was a bottle of opium lying there on the bed. I don't see it here.

Mr. Dore: Your Honor, may I have this marked Plaintiff's Exhibit 2 for identification? It consists of six jars and one small tin.

(Objects referred to marked Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Dore): The bailiff has placed before you there Plaintiff's Exhibit 2 for identification. Can you identify any of those objects, Captain?

A. Here is the bottle of opium that was laying on the bed alongside. He said he paid $100 for it. My [16] initials are scratched on the top of this one here. (Indicating.)

Q. What are your initials?

A. R. W. M.,—11-24-48. This—I didn't find these other bottles. They were laying around in the cupboard and in the bedroom.

The Court (Addressing the witness): Put the same lid back on each one you take off.

(Witness complies.)

Q. (By Mr. Dore): Can you identify any of the other jars or the tin?

(Testimony of Robert W. Morris.)

A. I didn't find these other jars and I don't see my initials on them.

Q. Can you identify the tin, Captain?

A. I don't know where this was found. I don't remember now. I don't see any initials on it, either.

Q. What was done with the equipment and material in Plaintiff's Exhibit 1 for identification?

A. I took all this in the front room and I sat it there on a stand while I was talking to Parker, and as the fellows found these other things they would bring it in and I would mark it.

Q. And what happened to it after that?

A. I gave it to Detective Zuarri and Musselman and they took it down to the police station and turned it [17] in to the property room.

Q. Now, as to Plaintiff's Exhibit 2, concerning the items there of which you have spoken, what occurred to them after they had been gathered together? If you know.

A. Zuarri and Musselman took everything in a sack and took it down to the property room and put them all in together. They were all turned in together,—everything.

Mr. Pomeroy: May I ask this question: Do you know that they turned them in to the property room?

The Witness: I sent them downstairs with it.

Mr. Pomeroy: Well, I move it be stricken due to the fact he had no way of knowing whether they were turned in to the property room.

(Testimony of Robert W. Morris.)

Mr. Dore: I have no further questions, Your Honor.

The Court: Well, have you anything to say in opposition to the request that it be stricken, that answer objected to?

Mr. Dore: No. I agree that it should be stricken.

The Court: The answer is stricken. The Court will disregard it, as to the officers turning it into the property room.

Mr. Dore: Yes, Your Honor.

The Court: You may cross-examine. [18]

Cross-Examination

By Mr. Pomeroy:

Q. Captain Morris, what time did you say you received this telephone call? A. About 9:30.

Q. Are you sure of the time?

A. Oh, it could have been 20 after 9:00, or 9:30, or a quarter after; around 9:30.

Q. If some of your officers stated it was 9:00 o'clock, would you say it could have been 9:00 o'clock?

A. Well, I thought it was later than that at the time. I wrote it down at the time.

Q. Now, you referred to some address. They told you in this conversation that it was Apartment B, is that right?

A. They said the top floor, Apartment B.

Q. What were you referring to when you answered the questions of Mr. Dore in regard to the

(Testimony of Robert W. Morris.)

address? What were you reading that you took out of your pocket?

A. Well, yesterday or the day before I wrote down the address on a piece of paper in case I forgot the address today.

Q. May I see that? Would you get it, Mr. Clerk?

(Witness presents a piece of paper to the bailiff.)

Mr. Pomeroy: Mark this, please. [19]

The Witness: May I look at it before it is marked? There is something on the other side I want to look at first.

Do you want both of these sheets? This has no marks on it.

Mr. Pomeroy: No.

The Court: Let this sheet be marked Defendant's Exhibit A-1.

(Paper referred to marked Defendant's Exhibit No. A-1.)

Q. (By Mr. Pomeroy): Now, when did you make those marks to which you referred in this testimony? A. On these bottles?

Q. No; on this Exhibit A-1?

A. That I just turned in?—the piece of paper?

Q. Yes. A. The day before yesterday.

Q. Where were you when you made those marks?

Mr. Dore: I object, Your Honor. It isn't material as to the basic issue here. This witness is

(Testimony of Robert W. Morris.)
entitled to refresh his mind from what ever he might have.

The Court: Does the government admit that he has used that paper for the purpose of refreshing his recollection? [20]

Mr. Dore: Well, we might ask him, Your Honor.

Did you, Captain, use this piece of paper here to refresh your memory as to the address?

The Court: In connection with your testimony here given today?

The Witness: Yes.

The Court: The objection is overruled.

Q. (By Mr. Pomeroy): Now, Captain, where were you when you made this memorandum?

A. In Mr. Dore's office.

Q. And where did you get that address then? How did you find the address to write down? How did you get the information?

A. I believe—I am not sure, but I believe—I believe that Detective Zuarri or one of the detectives was next to me and I said, "Is that address 1219 and ½? And he said, "Yes." And I wrote it down. I am not sure just how I did write it down.

Q. You do not know whether that is the way or not, is that right?

A. Well, I didn't think much——

Q. That was only two days ago, wasn't it?

A. That is right.

Q. And now you do not know whether it was 9:30 or 9:00 when this call came in last November either, do you? [21]

(Testimony of Robert W. Morris.)

A. Well, I wouldn't remember for six months if I hadn't wrote it down at the time.

Q. So that at this time you are unable to tell us whether it was 9:30 or 9:00 o'clock?

A. No, I think it was closer to 9:30, but I wouldn't swear to it.

Q. Now, you say you do not know who it was that called you on the telephone, is that right?

A. That is right.

Q. Now, repeat word for word what that conversation consisted of.

A. I will repeat it to the best of my memory.

Q. That is all we can expect, Captain.

A. He asked me if my name was Captain Morris. The phone was handed to me. The fellow asked the other officer for Captain Morris. I answered the phone. I said, "This is Captain Morris." So I got something—I will have a hard time giving you the substance of that conversation word for word.

Mr. Dore: I want to interpose an objection at this time, Your Honor. I do not believe that counsel has set a proper basis for asking this question of the witness. He has not ascertained whether this witness can relate word for word the testimony of the conversation over the telephone. [22]

The Court: That objection would be proper to one conducting direct examination, but in the Court's opinion it is not well taken as applied to cross-examination. It is overruled. On cross-exam-

(Testimony of Robert W. Morris.)

ination almost limitless liberality is indulged in in favor of the cross-examiner.

You may proceed.

Mr. Dore: Yes, Your Honor.

A. He told me to get to 1219 and ½ Yesler as quick as I could; somebody was in trouble and I better come up and see about it. I tried to find out what the trouble was and he was a little vague. He said the fellow was poisoned. I said, "What kind of poisoning?" He said, "It could be 'goof-balls'," or something else. He said, "He is in bad shape." I said, "Where can I find you?" He said, "I'll be here." He wouldn't tell me who he was or anything about him. I talked there quite a bit. I reworded the questions different ways trying to find out who it was, or what would happen when I got there. And I said, "Why are you calling me?" He says, "I thought you would be interested."

Q. You reworded the questions, you say?

A. I tried to find out a little more about it before I went up there.

Q. Now, tell the Court what goof-balls are. [23]

A. Well, they are barbital. They don't come under the Narcotic Act. They are just sleeping tablets. We have quite a few of them. Maybe twice a day they come in.

Q. Is that all goof-balls are, barbital?

A. That is all we call them.

Q. There are goof-balls which contain narcotics, aren't there?

(Testimony of Robert W. Morris.)

A. We never use that term in the police department. Goof-balls are usually barbital.

Q. So the question was that somebody was in trouble up there? A. Yes.

Q. And what did they tell you this trouble was, again?

A. Well, he said he had passed out,—he was unconscious.

Q. And he mentioned goof-balls? A. Yes.

Q. Is that right? A. Yes, sir.

Q. And what address did he give you?

A. 1219 and ½ Yesler.

Q. That is all?

A. Yes,—Apartment B. I asked him where was B. And he said at the top of the stairs, the first door at the left—he said, "It is the first door at the top of [24] the stairs."

Q. Well, now, Captain Morris, didn't you sign an affidavit on the 25th of April, 1949, concerning this call and the address that the man gave you?

A. I signed an affidavit sometime in the Spring.

Q. Didn't you say that it was at the head of the stairs on the second floor?

A. Well, I can explain that. Yes, it is the second floor. The steps there, they go up and then they turn onto a little landing and they they go up again. I don't know whether it is the second floor or not. You go up two flights of steps. I think the first one there is just a landing. I don't think—there might be a door on that floor, but I don't think so.

(Testimony of Robert W. Morris.)

Q. Well, then, you believed that you were answering a call for somebody who was out with goof-balls, is that right?

A. I didn't know what it was. I didn't know whether he was poisoned or what he was poisoned off of. He talked like he was in bad shape, that he was going to die.

Q. What did he say it was? Give us the words that made you think the man was going to die.

A. I said, "What kind of poison?" He said, "I don't know; it can be goof-balls."

Q. Is that what gave you the impression that the man was [25] going to die?

A. They die off of them, yes.

Q. Well, is that the remark made by the informer?

A. Well, he didn't know what kind of poisoning. He had evidently seen the fellow; was worried about him.

Q. Captain, did you call a doctor? A. No.

Q. Or did you call an ambulance? A. No.

Q. When people are going to die or are hurt or sick, is it usual for you with the homicide, robbery—and what other items do you take care of up there? What was your previous testimony? You took care of what for the City of Seattle?

A. The Night Shift, Detective Division,——

Q. Homicide? A. Yes.

Q. Felons? A. Yes, and burglary.

Q. Burglary? A. Yes.

(Testimony of Robert W. Morris.)

Q. Do you take the whole squad with you when you get a call, when somebody is sick or poisoned?

A. Not necessarily. I would ordinarily send out a couple of fellows. But this case, we were going out to work [26] another case, and I hadn't finished talking, and we were going up in that direction, 12th and Pike. It wasn't out of the way to go by this place here.

Q. I see. Now, when you got there you say that there was no one there, is that right?

A. At the front door?

Q. Yes.

A. I didn't see anybody at the front door.

Q. And how did you get into this apartment?

A. Just walked in.

Q. What about the door? Was there a door to the——

A. There was a door at the sidewalk of the apartments, maybe two or three feet from the sidewalk there, and that was open and I just walked in that one.

Q. That door was open?

A. No, that was shut.

Q. That was shut. How did you get through that door? A. Just walked in.

Q. And it was not locked?

A. No, it wasn't locked.

Q. You are sure of that? A. That is right.

Q. And then what did you do after you went through that door?

(Testimony of Robert W. Morris.)

A. Well, we looked around. We didn't see anybody. There [27] was just a little hallway there, so I walked up these steps.

Q. How many flights did you go up?

A. Well, as I remember, you walk up—may I use my hands? You walk in a little hallway. You go up a bunch of steps like that. (Indicating.)

Q. Now, at the top of that first flight of steps, is there a door there?

A. I don't remember. I don't think so, but I wouldn't—I am not sure.

Q. How many apartments are there in this building?

A. Well, I was only in the place one time. I don't know if there is over two or if there is four. I don't know.

Q. There are two apartments in that building, isn't that right?

A. Well, there could be four; I don't know.

Q. Well, did you see more than two doors?

A. Well, I don't remember now.

Q. You do not remember how many doors you saw?

A. No. I saw a door—it seems to me there was a door on the first floor, to your right as you go in the first door. There was a door there.

Q. And then you go up a flight of stairs?

A. Yes. [28]

Q. Is there a door there?

(Testimony of Robert W. Morris.)

A. I don't know whether there is a door there or not.

Q. Then you go up some more?

A. You turn to your right and go back up some some steps.

Q. And there is another door there?

A. Yes.

Q. You did not know how many doors there were?

A. All I can remember is the two doors, the one on the first floor and this one to his room.

Q. Well, now, when you got up to the apartment which Mr. Parker has, you went through that door, too? A. That door was open.

Q. That door was open. How far was it open, Officer? A. About that far.

Q. You are indicating about how many inches, would you say?

A. Oh, eight, nine, ten or twelve.

Q. Eight, nine, ten or twelve. Were there any lights on in that apartment?

A. No. There was a light in the hallway, and you could see around the apartment fairly well, though. There were lights from the street and from the hallway. You could see everything in the room very plain.

Q. And was there any light on in the apartment?

A. Well, there was none in the din*n*ing room and the living [29] room, until we got to his bedroom.

(Testimony of Robert W. Morris.)

Q. Did you see any lights as you stood in the hallway looking into his opening which you say was the door? A. No.

Q. Did you hear any noise? A. No.

Q. You just walked in?

A. I kept calling out. I didn't want to get shot.

Q. And you heard no answer?

A. No answer.

Q. And then you walked on in?

A. That is right.

Q. And then where did you go after you went into that door?

A. Well, I went—I went through that door into the living room; then I went into the din*n*ing room.

Q. And how did you get into these various rooms? Did you open the doors to go in?

A. Between the living room and din*n*ing room is wide open. It is just a big arch, you know. (Indicating.)

Q. How did you get in to where Mr. Parker was?

A. I saw an—in the din*n*ing room, I saw a door there. I was calling out all the time. So I opened the door and called out.

Q. That door was closed and you opened that?

A. That is right.

Q. And you called out. And all these men that you took with you, they all work with you on the squad, don't they? A. Yes.

Q. And you did not call a doctor?

(Testimony of Robert W. Morris.)

A. After I saw him, you mean?

Q. No, before,—upon receipt of this anonymous call. A. They would'nt answer a call——

Q. Just a moment! Did you call a doctor?

A. No.

Q. Did you call an ambulance? A. No.

Mr. Dore: Your Honor, I object here. I believe the witness has a right to explain his answer. He was endeavoring to explain his answer and counsel cut him off.

The Court: I think, also, that the counsel examining has the right to have the question answered. In this particular instance the government counsel can redirect the witness' attention to further details if that seems later to be desired.

Mr. Dore: Yes, Your Honor.

Q. (By Mr. Pomeroy): Now, you went in a car by yourself up there, did you? [31]

A. Yes, sir.

Q. And how many other cars went along on this trip?

A. Well, I think there was two other cars.

Q. You think there were two other cars. Do you know?

A. Well, yes. The other fellows went up—they each had a car,—Zuarri and Waitt had a car and Musselman and Ivy had a car.

Q. Three cars went up there, then?

A. Yes.

Q. Is this a two-story building or three-story?

(Testimony of Robert W. Morris.)

A. Two-story.

Q. A two-story building. You do not know how many apartments there are in it?

A. Well, I was only in the place one time. I didn't pay any attention to it. It might have been three-stories. I wouldn't bet money on it.

Q. Now, as a matter of fact, Captain Morris, when you walked into the room where Mr. Parker was, you showed him your badge, didn't you?

A. Not at first.

Q. Well, how long after you had been in there did you show him your badge?

A. We had a little conversation first.

Q. What was that conversation?

A. When I went in the door first I said, "What seems to be [32] *to be* the trouble?" I saw a man laying there passed out. He said, "There it is." Shall I go ahead?

Q. Go ahead.

A. He said, "There it is." I said, "There what is?" He said, "There it is." I said, "There what is?" I looked down and then is when I saw this outfit. I never saw it up until that time.

Q. You had no idea there would be narcotics in that room when you walked in?

A. No, I didn't have any idea.

Q. No idea at all, even after the man mentioned goof-balls to you?

A. They are not narcotics.

Q. During this conversation, I will ask you

(Testimony of Robert W. Morris.)

Captain Morris, didn't you say to Mr. Parker, "Well, we understood there would be more narcotics here, more opium?" A. No.

Q. Did you or did you not make such a statement to Mr. Parker at that time?

A. I did not.

Q. Did you make any statement that sounds similar to the words I have just used?

A. I might have made a statement like when I was telling the fellows to search, "There must be some more around—go ahead and look; there must be some more around." [33]

Q. Why would you say that?

A. Well, we had this one bottle there, and they did dig up Yen Shee and a bunch of stuff later on.

Q. You say you did not make such a statement to Mr. Parker? A. No, sir.

Q. But you understood there was more there?

A. I didn't say that.

Q. As I understand on direct examination, you asked him if he would help you, is that right?

A. That is right.

Q. And how did you mean that?

A. Well, I would like to get the source of the supply. I was interested in that.

Q. Did you make him any offer of reward for his help?

A. I just asked him if he would like to turn his connection in. And he said he wasn't interested. And I smiled and said, "That is all right. That is

(Testimony of Robert W. Morris.)

fine." That is about as far as the conversation went on that subject.

Q. During that conversation didn't you say to Mr. Parker, "If you will tell us where you got it, we can take this and put it with our next case, add it to that and let you out?"

A. No, I didn't say that. [34]

Q. You are sure of that? A. Yes, sir.

Mr. Pomeroy: I want to have this marked for identification.

The Court: Let this be marked Defendant's Exhibit A-2.

(Exhibit referred to marked Defendant's Exhibit A-2 for identification.)

Mr. Pomeroy: Is there some way, if your Honor please, that we can have that placed on an easel?

The Court: No, but if it is of great importance, Mr. Pomeroy, both counsel can come forward; and if you wish the defendant to likewise come forward, he may do that.

Mr. Pomeroy: If your Honor please, I wish to state at this time that I had this prepared beforehand rather than to have him make it here. All it purports to be is the street.

Mr. Dore: May I ask, Counsel, is it in any definite scale?

Mr. Pomeroy: No, it is not in any definite scale.

Q. (By Mr. Pomeroy): Is this a reasonable

(Testimony of Robert W. Morris.)

facsimile, Captain Morris, of the streets surrounding the general area where this arrest took place?

A. It is.

Q. Could you mark on Defendant's Exhibit A-2 the approximate location of the building where this arrest took place?

A. This is a little alley. I will put that on there. It might help.

Q. An alley?

A. There is a little street in here.

Q. Make that an "A." The figure "A" marks a little alley which has been placed in there by Captain Morris. A. His house is about here.

Q. The house in which the arrest was made. Now, will you make a little "x" there—or make it "B." Make it a "B."

A. (Witness complies.)

Q. Now, Captain, you say that is a two-story house, is that right?

A. I said I wasn't sure. I think it is. It could be.

Q. And upon getting the call about someone being poisoned, or dying in this house, you rushed up there. Now, where did you park your car when you went up there?

A. It was somewhere along in here.

Q. Just put a little mark there, and make that "C."

A. Let me think a moment. (Witness complies.)

(Testimony of Robert W. Morris.)

Q. That is where you parked your automobile on this call? [36] A. Yes.

Q. Where did Zuarri and Waitt park their automobile?

A. I will explain and it will help me remember. I got out of the car——

Q. Just a moment! Just please state where Zuarri and Waitt parked their car?

A. I don't know.

Q. You have no knowledge where that car was?

A. They either parked back here or over here. One seemed to me to be parked over here. (Indicating.)

Q. Just a moment! Maybe this will help you recall. Where was Mr. Parker taken and how was he taken to the station after the arrest? Whose car was he placed in and where was that car?

A. Well, I don't remember.

Q. Well, weren't you with him after the arrest?

A. I don't think I took him down to the station. I think one of the other fellows did.

Q. Weren't you all out in the street together when you arrested him?

Mr. Dore: I object, your Honor. This was not brought up in direct examination, as to what occurred after the arrest.

The Court: Overruled.

A. The other fellows parked either here or here. (Indicating.) [37]

They got out of their car——

(Testimony of Robert W. Morris.)

Q. All right. Now, will you make a little "D" there for one of them? A. "D?"

Q. "D."

A. I am not positive of this. I think there was one parked here.

Q. And make an "E" over here.

A. (Witness complies.)

Q. Now, you think the other two cars were parked that way, is that right?

A. Well, I think so.

Q. Now, I will ask you whether or not, Captain Morris, one car wasn't parked over a block away and around the corner?

A. Well, I didn't——

Q. Just a moment. At the time you were searching this house?

A. I don't think so. I don't know. I wouldn't know.

Q. Didn't you walk up this street with the defendant and the other detectives? (Indicating.)

The Court: Which street, Mr. Pomeroy?

Q. Indicating 12th Avenue, after the arrest?

A. I didn't go back to the station with him after the arrest, I don't think, at all. [38]

Q. I said: Didn't you go out in the street and go around this corner? A. I did not.

Q. I will ask you: Wasn't there one of your cars parked about a block north of Yesler Way rather than where you indicated?

A. I don't believe so. I don't know.

(Testimony of Robert W. Morris.)

Q. Well, didn't you just indicate that they were parked all around here in this area on Yesler Way near the apartment house?

A. I told the fellows 12th and Yesler, and when I got up there they drove up. And I saw the fellows here. (Indicating.) I think one turned around here and parked and one came up here. They were all standing down the street here when they got out of their cars.

Mr. Pomeroy: That is all.

Redirect Examination

By Mr. Dore:

Q. Looking at this chart again, Captain, from where you sit there, you have marked certain places here where you believe the cars were?

A. I am not sure about those other cars. All I know about is my own. They might have parked anywhere.

Q. In other words, you were not certain. You are not [39] certain at this time where those cars were parked; is that true?

A. I wasn't paying any attention.

Mr. Dore: That is all in regard to the chart, your Honor.

Mr. Pomeroy: That is all.

The Court: Is there any further cross-examination?

Mr. Pomeroy: No, your Honor.

Mr. Dore: Yes—excuse me, your Honor. I have some redirect.

(Testimony of Robert W. Morris.)

The Court: Government counsel may now ask questions on redirect examination.

Redirect Examination

By Mr. Dore:

Q. Mr. Pomeroy asked you, Captain, whether you called a doctor, and you said no, that you had not, and then I believe you tried to explain why. Would you tell the Court why you did not call a doctor?

A. Well, doctors or ambulances won't come out on any of these police cases until you look at the person first and see how they are and then call for them. They haven't time unless the police say first that they are needed.

Q. Has that been your general experience with the number [40] of cases you have handled?

A. That is right.

Mr. Dore: No further questions.

Mr. Pomeroy: That is all.

The Court: Step down.

(Witness excused.)

The Court: At this time we will take a five minute recess.

(Whereupon, a five minute recess was taken.)

The Court: You may proceed.

Mr. Dore: I will call as my next witness, your Honor, Andrew Zaurri.

The Court: Let the record show that all are present as before the recess.

ANDREW ZUARRI

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dore:

Q. Mr. Zuarri, will you state your name and spell your last name for the record?

A. Andrew Zuarri, Z-u-a-r-r-i.

Q. Will you give your address, please? [41]

A. 2829 Elmore.

Q. What is your business or occupation?

A. Police officer.

Q. How long have you been a police officer?

A. Oh, approximately two and one-half years.

Q. Are you employed by the Seattle Police Department? A. I am.

The Court: Is there anyone else having a name like yours, or similar to yours, who has been connected with the police department longer than you have?

The Witness: Yes, sir. My father is a retired police officer.

The Court: You may continue.

Q. (By Mr. Dore): And what detail are you attached to? A. Felony unit.

(Testimony of Andrew Zuarri.)

Q. What captain is in charge of that unit?

A. Captain Morris.

Q. Now, were you so employed on November the 24th, 1948? A. I was.

Q. And what shift did you have that day?

A. Eight to four. That is our usual shift.

Q. Now, where were you at approximately 9:00 or 9:30 that evening?

A. I was in our detail office.

Q. Who else was present there? [42]

A. Captain Morris, Detective Waitt, my partner, Detective Musselman and Detective Ivy.

Q. And what occurred about that time?

A. Well, Captain Morris—well, the phone rang and I answered it. It was for Captain Morris.

Q. Then what happened?

A. I, in turn, gave him the phone and he talked to the party on the phone. I didn't pay any attention to the conversation. Then Captain Morris said, "Well,——

Mr. Pomeroy: Just a moment! You cannot relate any conversation.

The Court: You may say what happened, but do not use the words anyone spoke.

Q. Do not recite his conversation, the Judge means. What happened?

A. We were then ordered to leave the office.

Q. And what was the basis of the order? If you know. A. The phone call.

Mr. Pomeroy: Well, just a moment!

(Testimony of Andrew Zuarri.)

Q. Do you know the nature of the call?

A. No, sir; I didn't,—not at that time.

Mr. Pomeroy: I move that the answer be stricken, if your Honor please, to the previous question where I said, "Just a moment."

The Court: "What was the basis of the call?" Is [43] that the question to which the objection was made?

Read that back to me, Mr. Reporter.

> (The reporter read back as follows:
>
> "Q. And what was the basis of the order? if you know. A. The phone call.
>
> Mr. Pomeroy: Well, just a moment!
>
> Q. Do you know the nature of the call?
>
> A. No, sir; I didn't,—not at that time.")

The Court: Well, that objection is sustained. It will be stricken.

Q. (By Mr. Dore): What were your orders at that time?

A. We were told to meet the Captain at 12th and Yesler.

Q. And what did you do?

A. Well, I and my partner, Detective Waitt, got into our police automobile and drove to 12th and Yesler.

Q. And about what time did you arrive there at 12th and Yesler?

A. I imagine it was within five or six minutes after we left the station.

(Testimony of Andrew Zuarri.)

Q. Which would be approximately what time?

A. Oh, about 9:15.

Q. About 9:15. And when you got to 12th and Yesler, who did you meet there, if anyone?

A. Well, we saw Captain Morris on the street corner. We [44] parked our automobile and walked up to him.

Q. Where did you park your automobile? If you recall.

A. I am fairly certain it was parked facing west on Yesler Way towards 12th Avenue.

Q. Now, you say that you then walked up to Captain Morris. Where was he at the time?

A. He was standing in front of 1219 and ½ Yesler Way.

Q. Now, you say that this was about 9:15 in the evening. What was the condition as to light at that time?—light or darkness?

A. It was dark.

Q. And are there any lights in that locality?

A. I am not sure.

Q. What did you do after you met with Captain Morris there?

A. We waited a few minutes for Detective Ivy and Musselman.

Q. And did they arrive later?

A. Yes. They arrived a few minutes later.

Q. And then what occurred after Musselman arrived?

(Testimony of Andrew Zuarri.)

A. Captain Morris ordered Detective Ivy and myself to stay outside in the street.

Q. And did Detective Morris say anything else at that time?

A. He said for us to wait there. If he needed us he would call us, because he wasn't too certain as to what it [45] was all about and he didn't want too many up in there.

Q. And did you go into the house with Captain Morris?

A. No, sir; I did not,—not at that time.

Q. Where did you stay?

A. We stayed on the street in front of 1219 and ½ Yesler Way.

Q. Did you see Captain Morris go into the apartment? A. Yes, sir.

Q. And from your recollection what was the position of the door near the sidewalk?

A. It was right off the sidewalk.

Q. Was the door open or closed when you saw it?

A. Well, the door was shut while we were standing there.

Q. It was shut. Did Captain Morris have any difficulty going through the door? A. No, sir.

Q. It opened right up, did it?

A. It opened right up.

Q. Did he say anything at that time when he went into the house? A. Not that I recall.

Q. Now, did you later go into the apartment?

(Testimony of Andrew Zuarri.)

A. Yes, sir.

Q. About how long after Captain Morris went in?

A. Oh, possibly seven or eight minutes. [46]

Q. And do you recall who went into the apartment with Captain Morris? A. Yes, sir.

Q. Who was that?

A. Detective Waitt and Detective Musselman.

Q. Now, you say you went in about eight minutes after that. What did you do when you got in there; what did you see and hear?

A. Well, when we got in there Captain Morris gave us orders to search, and just at that time—he just designated a portion of the apartment for me to search, and I proceeded to search.

Q. What portion did he designate for you to search?

A. Well, the kitchen and the back porch.

Q. Now, who was there at the time you came into the apartment?

A. Well, Captain Morris, Detective Waitt and Detective Musselman. Detective Ivy followed me into the room and the defendant was standing in the din*n*ing room.

Q. This man seated here to my right?

A. Yes, sir.

Q. Next to Mr. Pomeroy? A. Yes, sir.

Q. And you say he was in the din*n*ing room at the time that you arrived there. Now, what search did you make [47] and what did you find?

(Testimony of Andrew Zuarri.)

A. I searched the back porch and the kitchen and, also, a portion of the bathroom.

Q. Did you find anything?

A. I found a couple of empty jars, one particular jar that had traces of something in it.

Q. Well, now, before you on the desk there is Plaintiff's Exhibit 2 for identification. Can you identify any of those objects before you?

The Court: Will you place back on each receptacle the cover that you take off of it immediately after you finish examining it so as not to confuse the covers that came with the containers?

A. This is one jar I found in the bathroom.

Q. How could you identify that as being the jar?

A. By the mark.

Q. What mark?

A. Well, I put two numbers of my serial number on it.

Q. What are those numbers?

A. My number is 777.

Q. And what did you put on the jar?

A. 77.

Q. And where is that marked on the jar?

A. On the lid.

Q. Does that jar contain anything? [48]

A. It had traces of some product in here.

Q. Is there anything else there that you can identify? A. (No response.)

Q. Is there anything else that you saw there in the apartment at the time you were present?

(Testimony of Andrew Zuarri.)

A. Well, I saw a number of jars, but I didn't mark them.

Q. Were they similar to the jars before you?

A. They were similar to those jars. I would hesitate to say those are the same jars.

Q. Now, as to those objects on your left there, can you identify any of those, or did you see any of those while you were there?

A. I saw objects similar to those.

Q. And what objects did you see?

Mr. Pomeroy: For the purpose of this record, in order to shorten the time, we will stipulate that these things were found at Ruis Parker's apartment at 1219 and ½ Yesler Way and no further identification is necessary as far as we are concerned in this case,—just the procedural form of identification of these items.

Mr. Dore: Thank you, Counsel.

Q. (By Mr. Dore): What did you do with this jar that you found?

A. I placed it on a table with a bunch of others.

Q. Do you know what happened to this evidence before you,—or these items before you? [49]

A. They were taken down to the police station and then placed in evidence.

Q. Who did that?

A. Ivy and Detective Musselman.

Mr. Dore: May I have this marked Plaintiff's Exhibit 3, your Honor, for identification?

(Testimony of Andrew Zuarri.)

Mr. Pomeroy: I am ready to stipulate, Mr. Dore, that it is not necessary to further identify those.

Mr. Dore: I would like to have that in there to complete the case, your Honor.

The Court: Plaintiff's Exhibit 3 will now be marked for identification.

(Exhibit referred to marked Plaintiff's Exhibit Number 3 for identification.)

Q. (By Mr. Dore): Can you identify that Plaintiff's Exhibit 3 for identification?

A. Yes, sir.

Q. What is that?

A. This is the envelope that I filled out when I placed this evidence into evidence.

Q. And what did you place in that envelope at the time?

A. Well, it is all listed on the face of the envelope, what went in there.

Q. And where did you place that evidence?

A. Into the police department property room.

Q. With whom?

A. Officer Frank Leary who was on duty at the time. He received the envelope.

Q. Now, did you at any time talk to the defendant, Mr. Parker? A. Yes, sir.

Q. When did you talk to him?

A. He was in our car on the way down to the station, and I talked to him on the following day.

(Testimony of Andrew Zuarri.)

Q. What did he say at the time that he was in your car?

The Court: If anything! He has not yet said that anything was said in the car.

Mr. Dore: He said that he had a conversation, your Honor.

The Court: Well, he said he was in the car with him and then he talked to him the next day, as I understood it.

Q. (By Mr. Dore): Well, did you have a conversation with Parker in the car on the way to the station? A. Yes, sir.

Q. And what did you say and what did he say?

A. The conversation amounted to about the length of time that he had been using a narcotic.

Q. Well, what did you say and what did he say?

A. Well, I asked him how long he had been using. And he [51] said, "Approximately five years."

Q. Was anything else said on the way to the station in the car?

A. He stated at that time that he had acquired the habit about five years ago, and meanwhile had taken the cure in that period of time, and then he started again.

Q. Was there any further conversation on the way to the station that you recall?

A. Yes, one more thing. He stated at the time

(Testimony of Andrew Zuarri.)

that he was glad it happened because he wanted to take the cure.

Q. Anything further?

A. No, sir; that's about all.

Q. Now, you say that you had a conversation with him subsequent to the ride in the car to the station. When and where was that?

A. That was the following day, which was Thanksgiving.

Q. And when and where did you talk to him?

A. That was about 8:00 p.m., in the evening at the felon detail office.

Q. And what was said at that time by you and by the defendant?

A. It was in regard to how he was feeling.

Q. Just relate to the best of your recollection what was said. [52]

A. Well, it was—the conversation was as to how long he had been using narcotics, and mostly we discussed, oh, different effects and one thing and another. It was more or less an impersonal conversation, things that I was curious about, and, as I say, as to how he was feeling.

Q. Was there any further conversation at that time?

A. Nothing more than I remember he added that he wanted to take the cure, and we discussed that.

Q. Did you ever take a statement from the defendant?

A. I took a statement, but it was mislaid.

(Testimony of Andrew Zuarri.)

Q. You do not have that with you now?

A. No, sir.

Q. Do you have any knowledge of where it might be? A. No, sir.

Q. And at the time you took the statement, what did he tell you then?

A. Well, it was just an admission that he had smoked opium.

Q. Anything else?

A. Nothing other than that.

Q. Anything concerning the date of November the 24th?

A. No. Mr. Parker and I got along very good. He was very cooperative and we had a very friendly talk. He didn't want—— [53]

Q. You did not ask him about the items in the apartment?

A. Well, he admitted that they were his.

Q. When did he admit that to you?

A. Well, in the statement there was that admission.

Q. And when was that statement taken?

A. That was on the 25th.

Mr. Dore: I have no further questions.

Cross-Examination

By Mr. Pomeroy:

Q. Mr. Zuarri, how much after Captain Morris got to 1219 and ½ Yesler Way on the particular night that Parker was arrested did you arrive there?—how long after him?

(Testimony of Andrew Zuarri.)

A. Oh, I don't really know that. He was already there when we got there.

Q. He was there?

A. He was standing on the street.

Q. All right. And how long after you got there did the other two detectives come?

A. Oh, possibly five minutes or more.

Q. Five minutes or more. Now, how long did it take you to go from your patrol office, or where you were with the other detectives and Captain Morris, up to 1219 and ½ Yesler Way? [54]

A. That would depend on whether we had our cars assigned out at that particular time.

Q. How long did it take you to go down and get in your car and go right out?

A. Oh, I don't imagine it would take more than five minutes.

Q. Five minutes to get up there. Now, you are under oath, and you say Captain Morris just walked in and the front door was unlocked?

A. Yes, sir.

Q. Absolutely unlocked? He just walked in?

A. All I saw the man do was put his hand on the door, and the door opened.

Q. Now, Mr. Zuarri, did you arrest the man?

A. He was already under arrest when I got there,—got into the apartment.

Q. And then did you take him out to your car?

A. I and Detective Waitt.

Q. All right. Now, just describe to the Court

(Testimony of Andrew Zuarri.)

the direction you went and where you went with the man after the arrest?

A. We took him across the street into the car.

Q. Just a moment! Who was with you when you left the apartment with the man?

A. Detective Waitt. [55]

Q. Just the two of you? A. Yes, sir.

Q. Where were the three other detectives?

A. They either followed us out or were on the street already.

Q. You do not know whether they went out first. You do not think they were left up in the apartment, do you?

Mr. Dore: I object, your Honor; that is argumentative.

The Court: Overruled.

Q. (By Mr. Pomeroy): You may answer.

A. As I recall, Detective Musselman and Ivy carried the evidence out; and we were ordered to take Mr. Parker in our car.

Q. Well, did you go out first or did the officers with the evidence leave first?

A. I remember Mr. Parker locking the door, so I imagine every one was out of the apartment.

Q. He locked the door to his apartment?

A. In my presence.

Q. Then you and Waitt took him down to the car, is that right? A. Yes, sir.

Q. And just describe to the Court the direction you took to go to your car and where your car was

(Testimony of Andrew Zuarri.)

after you [56] left the entrance to the apartment house known as 1219 and ½ Yesler Way?

A. Well, we walked across the street.

Q. Directly across the street?

A. Well, on an angle, more or less.

Q. On an angle across the street. I will show you what is marked as Defendant's Exhibit A-2 for identification. Do you recognize that as being similar to the location of the streets around where 1219 and ½ Yesler Way is? A. Yes, sir.

Q. Can you, with a pencil, show the Court the direction which you took with the prisoner to your car? Can you step down and do that? "B" there happens to be marked. Do you agree that that is the approximate location of 1219 and ½ Yesler?

A. I would say the approximate location.

Q. Now, do you have a pencil on you?

A. I have a pen.

Q. A pen.

The Court: Stand as far as you can to your left, Mr. Zuarri, and at the same time allow yourself the opportunity of reaching the location on the map with a pencil.

Q. Just mark it on there. [57]

A. I would say our approximate route was somewhat similar to that. (Indicating.)

Q. And where was your car parked, then?

A. It was on this side of the street facing west.

Q. Just mark in where your car was parked. Mark your car in there, if you will.

(Testimony of Andrew Zuarri.)

A. (Witness complies.)

Q. And mark that "F."

A. (Witness complies.)

Q. And that which is marked "F" is where your car was parked? A. Approximately.

Q. While you were in this apartment?

A. Yes.

Q. And your diagonal line, mark that "G."

A. "G." (Witness complies.)

Q. The line "G" is the approximate direction that—marks the approximate direction that you took the prisoner from the entrance of 1219 and ½ to your car? A. That is right.

Q. And then you left there, from that location, and took the prisoner to jail?

A. Yes. It was raining at the time.

Q. Well, what has that to do with it?

A. Well, that is how well I can remember. [58]

Q. That is to show that your recollection is good?

A. Good at that particular time.

Mr. Pomeroy: That is all.

The Court: Is that all?

Mr. Dore: No further questions, your Honor.

The Court: You are excused, Mr. Zuarri.

(Witness excused.)

The Court: At this time we will take our noon recess.

(Whereupon, a recess was taken until 2:00 o'clock p.m.) [59]

August 4, 1949, 2:00 o'Clock P.M.

(All parties present as before.)

The Court: You may call your next witness.

Mr. Pomeroy: May I ask Mr. Zuarri another question?

The Court: Yes. Mr. Zuarri, will you come forward and resume the stand?

ANDREW ZUARRI

the witness on the stand at the time of the noon recess thereupon resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Pomeroy:

Q. Mr. Zuarri, when you went to 1219 and ½ Yesler Way, Captain Morris was already standing on the sidewalk, is that right? A. Yes, sir.

Q. In front of this place?

A. I think it was in front. I am fairly sure it was in front.

Q. Well, in that approximate vicinity?

A. In the vicinity; not directly in front.

Q. Then you say five minutes or more later up came these other two officers, Ivy and Musselman?

A. Well, in a matter of a few minutes.

Q. And where did they come from?

A. Well, we all left the station——

Q. No! No! When you first saw them, when

(Testimony of Andrew Zuarri.)

you were standing there with Captain Morris, where did you first see Ivy and Musselman?

A. They were coming east on Yesler Way.

Q. They were going east on Yesler Way?

A. They were just about at the intersection of 12th.

Q. At the intersection of 12th. That was your first observation of them? A. Yes, sir.

Q. And then they walked, did they, up there to where you were?

A. They walked—I saw them on the street. They walked up. How far they walked, I don't know.

Q. But you first saw them up from the corner of 12th and Yesler? A. They were in the car.

Q. They were what?

A. They were in the car.

Q. Oh, you first saw them in the car?

A. In the car.

Q. And they came up by car, then?

A. Yes, sir. [61]

Q. And then you saw them—you saw the car, then, rather than the men first?

A. Yes, I noticed the car.

Q. And you saw the car where again?

A. I don't remember if it was in the intersection or before it entered the intersection at 12th and Yesler.

Q. At 12th and Yesler. And then what did they do in their car?

A. I am not too certain—they disappeared—

(Testimony of Andrew Zuarri.)

whether they were looking for a parking place or were trying to find us. I believe they parked their car somewhere where we couldn't see it and come walking up.

Mr. Pomeroy: If your Honor please, I would like to come forward again.

The Court: You may do that, and opposing counsel will have and enjoy the same privilege.

Q. (By Mr. Pomeroy): Now, my understanding of your testimony is that you were standing here. (Indicating.)

A. Well, approximately there. (Indicating.)

Q. Approximately there. And you first saw them —would you make a little mark there and just label it "H?"

A. (Witness indicates with a mark.)

Q. And that is where you first saw Ivy and Musselman?

A. As I recall now, they made a left hand turn in the intersection. [62]

Q. Well, just make an "H" there where you first saw Ivy and Musselman.

A. (Witness complies.)

Q. Now, it is my understanding that that is where the car was with Ivy and Musselman in it when you first saw it? A. Approximately.

Q. Then where did they go in their car?

A. I believe they made a left hand turn and then possibly went up a block——

(Testimony of Andrew Zuarri.)

Q. Now, just a moment. They turned left and went north on 12th Avenue, is that correct?

A. I believe so.

Q. And then you did not see them anymore?

A. No.

Q. I see. And then where did you see them next?

A. Well, the next time I saw them was coming up the sidewalk.

Q. Coming up the sidewalk?

A. Coming up the sidewalk.

Q. Where was that? —on which sidewalk and where?

A. Well, it would be on the south side of the street,—walking west.

Q. The south side of Yesler?

A. On 12th, on Yesler. [63]

Q. You never saw them cross this intersection? (Indicating.) A. No; I don't recall that.

Q. Then what were you and Morris and your partner doing while you were waiting for them there? A. We were just standing in front.

Q. You were not watching for them to come?

A. I was.

Q. But you did not see them at all across the street there, or anything?

A. When they walked across the street, no; not at that particular time,—not that I recall.

Q. I see. You made an affidavit in this case, did you not? A. Yes, sir.

(Testimony of Andrew Zuarri.)

Q. And in that affidavit you said, "Ivy and Musselman came up on foot." You mean the second time you saw them?

A. The second time—the last time I saw them prior to Musselman going into the apartment house. They came up on foot.

Mr. Pomeroy: That is all.

Mr. Dore: I have just one question.

Redirect Examination

By Mr. Dore:

Q. As to the practical location of this 1219 and ½ [64] Yesler Way, that is in the City of Seattle?

A. It is.

Q. County of King? A. It is.

Mr. Dore: That is all. Step down.

(Witness excused.)

The Court: Call your next witness.

ROBERT W. WAITT

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dore:

Q. State your name. A. Robert W. Waitt.

Q. And what is your address?

A. 13219 1st Southwest.

Testimony of Robert W. Waitt.)

Q. And your business or occupation is what?

A. I am with the Seattle Police Department.

Q. How long have you been with the Seattle Police Department? A. Six years.

Q. And what detail are you attached to in the department?

A. To the felon unit,—to the felon department, —detail. [65]

Q. Were you so employed on or about November the 24th, 1948? A. Yes.

Q. Now, were you and—were you in Captain Morris' office at the time you received the telephone call that evening on the 24th? A. Yes.

Q. And after he received the telephone call, did he give you certain orders? A. Yes.

Q. What where those orders?

A. He told me to meet him at 12th and Yesler.

Q. And did you go to 12th and Yesler?

A. I did.

Q. About what time did you leave the police station? A. Approximately 9:30.

Q. And approximately what time did you arrive at 12th and Yesler?

A. Oh, it wouldn't be over five minutes. We just walked out and got in our car and drove up to 12th and Yesler.

Q. And upon arriving at 12th and Yesler, who was there? A. Captain Morris.

Q. And then what did you do?

Testimony of Robert W. Waitt.)

A. We walked across the street and he told me to come with him [66]

Q. And did you go with him? A. Yes.

Q. Where did you go?

A. 1219 and ½ Yesler Way.

Q. And what did you do when you got to that address?

A. We walked in through the front door and went up.

Q. Was the door open or closed?

A. The door was closed, but that's the main entrance to it.

Q. Was the door locked? A. No.

Q. What was your position with regard to Captain Morris? A. I was directly behind him.

Q. How far behind behind him at the time?

A. Well, I couldn't say as to the matter of feet. I was the next man. If you are walking in single file, I was directly behind him.

Q. Could you illustrate with your hands about how far away you were from him?

A. Well, I would say I was about three feet to the rear of him,—not over that.

Q. Who else was present?

A. Detective Musselman.

Q. Now, you say the door was unlocked?

A. Yes.

Q. Who opened the door? [67]

A. Captain Morris.

Q. And then what occurred?

Testimony of Robert W. Waitt.)

A. We went into a short hallway, up a flight of stairs, made a turn and went up another flight of stairs.

Q. Was that turn to the right or left?

A. Well, we turned—we went up this way and turned this way. (Indicating.) That would be left, I guess—we turned right.

Q. Your turned right? A. Yes.

Q. And what did you do when you got to the top of the stairs?

A. When we got to the top of the stairs there was a door on our left, and it was open. Captain Morris walked in.

Q. Were there any lights visible inside?

A. No.

Q. Was there any light or reflection from the outside in the apartment?

A. Partly in the front room of the apartment.

Q. Now, how far was that door open in the apartment? A. Approximately six inches.

Q. And what did Captain Morris do at the time that he went into the apartment? Did he say anything or do anything?

A. He pushed the door further on open and he —I heard him ask if there was anybody home. [68]

Q. Did you say anything at the time?

A. No, I didn't.

Q. And then what happened after you got into the apartment?

A. We entered into what was apparently a liv-

Testimony of Robert W. Waitt.)

ing room. It was a pretty good size room. And then we walked straight on back towards the dining room and he called out again, "Is there anybody home?" —or "Is there anybody here," or words to that effect. He got back into the dining room and there was a door—there was a door to our left—and he opened that door, and I went in there with him.

Q. And what was in there?

A. There was a bedroom.

Q. And what did you see in there?

A. There was a small light on over a nightstand that was sitting by the head of the bed and there was a man laying on the bed.

Q. Do you see that man in court today?

A. Yes.

Q. Can you point him out?

A. He is the defendant in the case. (Indicating.)

Q. Sitting next to Mr. Pomeroy?

A. Yes, sir.

Q. And what happened in the bedroom there?

A. Captain Morris asked him, "What's wrong?" —or "What goes on?"—or something like that—words to that effect. I don't recall exactly what he did say to the man. And the man kind of opened his eyes like—I mean you could see him open his eyes. It was kind of dim,—kind of dark in there. And he says, "There it is." And I didn't see anything at first, when I first looked, because we just came in from a lighted hallway.

Q. Then what happened?

Testimony of Robert W. Waitt.)

A. So Morris asked him,—Captain Morris asked him, "There what is?" Then we looked and then we saw this outfit there.

Q. Before you there is Plaintiff's Exhibits 1 and 2. Did you see any of those objects there?

A. Yes.

Q. What specifically did you see?

A. This dinner plate, and this little vasoline jar; this burner.

Q. Was that burning at the time?

A. Yes, it was. And this paper thing, and this pipe—pipe affair, and this needle here, and there is one——

Q. Now, did you make a search of the apartment? A. Yes, I did.

Q. Was that before or after the man was placed under [70] arrest?

A. That was after the man was placed under arrest.

Q. And did you find any specific items that are before you there? A. Yes, I found this box.

Q. Where did you find that?

A. I found that in the night stand,—in the top drawer of the night stand.

The Court: In the night stand?

The Witness: Yes,—what they call a night stand. The light was sitting on this stand, and, also a little radio, I believe.

Q. Was the door open or closed?

A. It was closed.

Testimony of Robert W. Waitt.)

Q. Did you find anything else?

A. I found one of these jars that's got—that had a newspaper inside that had some narcotics in that.

Q. Can you identify that jar there?

A. I would have to open it up.

The Court: You can unscrew the tops, but after you have looked at the contents, then put the top back on. Be sure to get the same top back on the identical jar or container from which you took it.

A. This one here that has got the newspaper in it.

Q. Is it marked? Did you mark it? **[71]**

A. Yes.

Q. How is it marked?

A. It's got my initials R. W. W., and my serial number, 5455 T.

Q. Did you find anything else in the apartment?

A. In the bathroom—on the bathroom shelf we found the rest of these jars.

Q. Was that a medicine cabinet?

A. It was just an open shelf. There was four or five of these jars all lined up.

Q. Now, did you talk to the defendant, Mr. Parker, at any time while you were there?

A. No; I never said anything.

Q. Were you present at any time when any other officer talked to him?—while you were there?

A. No.

Q. Did you talk to him subsequent to leaving 1219 and ½ Yesler Avenue?

Testimony of Robert W. Waitt.)

A. I might have asked him—I am not sure whether I asked him if there was any more narcotics in there or not. Other than that, no.

Q. Do you know what became of these objects after you left 1219 and ½? Do you know who had them?

A. This was all taken out into the front room. As each piece was picked up, it was taken out in the front room and it was put on a little table that was right [72] beside the door. Captain Morris was there practically all the time. And I remember I brought out some of the stuff, and some of the other detectives brought out some of the stuff, and from there Captain Morris took it all down to headquarters.

Q. Did you see him take it to Headquarters?

A. Well, he left there ahead of us because my partner and I took the defendant.

Q. Did you have anything to do with those items after that?

A. I just saw them down at Headquarters.

Q. Did you have any conversation with the defendant when you left there? Did he ride in your car? A. Yes, he did.

Q. Did you have any conversation in the car with him?

A. No, I don't believe I said anything to him.

Q. Did you hear any conversation between the defendant and anybody else in the car?

A. There might have been, but I don't recall.

Testimony of Robert W. Waitt.)

Q. Yes. Now, just one other question. In regard this 1219 and ½ Yesler Street, was that in the City of Seattle? A. Yes, sir.

Mr. Dore: Your witness. [73]

Cross Examination

By Mr. Pomeroy:

Q. Mr. Waitt, where did you park your car when you went up to 1219 and ½ Yesler Way?

A. Across the street.

Q. How did you get it across the street?

A. I made a U-turn in the middle of the block.

Q. You made a U-turn in the middle of the block and parked it across the street? A. Yes, sir.

Q. Then when you left 1219 and ½ Yesler with the defendant, where did you take him?

A. When I——?

Q. As you left 1219 and ½ Yesler, what route did you go?

A. The most direct route, which would be right over Yesler Way.

Q. Did you walk the defendant to your car?

A. I believe we did.

Q. You believe you did walk the defendant to your car?

A. Well, I mean we didn't—he was—he walked by himself, if that is what you mean.

Q. That is what I mean.

A. Yes; he walked by himself. [74]

Q. And he was in your custody at the time?

Testimony of Robert W. Waitt.)

A. Yes, because we was the last two to leave.

Q. What route did you follow after you left the door of 1219 and ½ Yesler Way?

A. We walked across the street to the car.

Q. Across the middle of the block there?

A. Yes.

Q. And your car was practically across the street from 1219 and ½ Yesler?

A. Oh, I wouldn't say it was directly across. It was across the street.

Q. Well, how far north, or I mean east or west of the location of 1219 and ½ was your car?

A. I would say it was angled a little bit east.

Q. Your car was angled a little bit east?

A. No; I mean in comparison to a direct line. If you took a direct line straight across 12th, from 1219 and ½, our car would be a little bit east of that.

Q. In other words, your car was a little bit east of the location of 1219 and ½ Yesler Way?

A. But across the street.

Q. But across the street? A. Yes.

Q. About how far from a direct north and south line; how far east would your car be in that respect?

A. I wouldn't know. It was relatively a short distance; I mean I didn't measure it. I couldn't tell you.

Q. Well, would it be five feet or 100 feet or 500 feet? Just to your best approximation.

A. It wouldn't be over 100 feet.

Testimony of Robert W. Waitt.)

Q. About 100 feet?

A. It wouldn't be over 100 feet.

Q. Would it be under 100 feet?

A. Somewheres under.

Q. 75 feet? A. I don't know.

Q. Would it be less than 75 or more?

A. Somewhere under 100 feet.

Q. Well, would it be more than a foot?

A. It would be more than a foot.

Q. All right. About how much now? You are a police officer and you have some idea of distances. Now, give us an approximation. That is all I am asking for.

A. Somewhere between 1 foot and 100 feet. It wasn't over 100, I know that.

Q. Would it be closer to 100 feet than one foot?

A. I don't know.

Q. Would it be closer to one foot than it would to 100 feet?

Mr. Dore: I object to these questions and this [76] line of questioning, Your Honor. I submit that it is not proper cross-examination. There was nothing in the direct examination concerning the location of these automobiles. Furthermore, I do not believe it is material to the crime committed here, as to where these automobiles were.

The Court: The Court has not heard counsel state what the purpose is, but I have seen it happen in many cases in the past where counsel pursued a line of inquiry analagous to this as bearing upon

Testimony of Robert W. Waitt.)
the credibility, the accuracy of the recollection of the witness and other matters affecting the credibility of the witness.

Is that any part of the reason for this line of inquiry?

Mr. Pomeroy: Yes, Your Honor. I believe I am entitled to a fair answer from this officer because he does have a knowledge of distances. They are trained in it and they do know how far they are on the police range when they are shooting, how many feet away, and so forth, and I think I am entitled to a fair answer, how far east of this line that this car was.

The Court: Well, the word "fair,"—of course, you are entitled to an opportunity to make a fair inquiry, but is there any other answer—— [77]

Mr. Pomeroy: I think that one phase of my inquiry in this case and one phase of the case is the credibility of these witnesses, and, also, as it will affect argument later as to this motion that I have previously made. The location of this car is very pertinent to that discussion.

The Court: In view of the last statement of counsel, the objection is overruled.

Q. (By Mr. Pomeroy): Now please, Mr. Waitt, give us your best approximation of how far east of a north-south line at 1219 and ½ Yesler Way your car was parked.

A. I would have to give you an estimate.

Q. That is all I want.

Testimony of Robert W. Waitt.)

A. I would say somewheres around 25 feet.

Q. About 25 feet? A. About 25 feet.

Q. Now, Officer, did you have a search warrant?

A. No.

Q. Did any officer with you have a search warrant? A. No.

Q. Now, do you work with the Federal Bureau of Narcotics as well as the City police department?

A. No.

Q. You have nothing whatever to do with the Federal Bureau [78] of Narcotics; is that what your testimony is?

A. I work for the City. I don't work for the Federals.

Q. I understand that. Do you do any work with the Federal Bureau of Narcotics?

A. In what relationship?

Q. In relation to the cases you make involving narcotics.

A. No. We make our cases ourselves.

Q. You make your cases?

A. We work on our own cases; they have their own cases.

Q. And they have their own cases?

A. Yes.

Q. What do you do with the cases you make?

A. We have two alternatives. We can either turn them over to the Federals after the arrest is made or we can charge them ourselves in our own state courts.

Testimony of Robert W. Waitt.)

Q. Directing your attention to November, 1948, what was your practice and procedure with respect to cooperation with the Federal Bureau of Narcotics?

A. Would you please state that again?

Mr. Pomeroy: Read it back, Mr. Reporter.

(The last question was repeated by the reporter.)

The Court: Do you understand the question?

The Witness: Well, not entirely.

The Court: Are you agreeable to specifying [79] whether or not he operated under any agreement or standing arrangement with them? Is that a part of your inquiry?

Mr. Pomeroy? Yes.

Q. (By Mr. Pomeroy): Did you have a standing arrangement with the Federal Bureau of Narcotics on the handling of narcotic cases?

A. No.

Q. The Seattle city police did not have any standing agreement? A. I didn't have any.

Q. Well, did your department? You are an officer of the Seattle department? A. Yes.

Q. A member of the Felon Squad?

A. Yes.

The Court: To your knowledge.

A. To my knowledge, no.

Mr. Pomeroy: If Your Honor please, I at this time will say that I think I will perhaps forego further examination of this witness in the event that I

Testimony of Robert W. Waitt.)
am permitted to call Captain Morris back for this particular line of inquiry. I thought I could get it from this witness, but apparently I cannot.

The Court: The Court will permit you to call [80] Captain Morris back for further examination, if you wish to do so. But whether you are satisfied with Captain Morris' examination or not, do you excuse this witness from further cross-examination?

Mr. Pomeroy: Yes, Your Honor.

Mr. Dore: I have no further questions of this witness.

The Court: You may step down.

(Witness excused.)

The Court: Do you wish to call him back now?

Mr. Pomeroy: I have no preference about it.

The Court: I thought you wished to do that now.

Mr. Pomeroy: I would like to do it now, if you do not mind.

Mr. Dore: I have no objection.

The Court: Recall Captain Morris now.

Mr. Dore: I would rather have these witnesses remain in attendance until we see how the plaintiff's case goes.

The Court: The witnesses are required to remain in attendance until later excused.

Captain Morris, will you resume the stand for further cross-examination?

(Addressing Mr. Pomeroy): You may resume your Cross-examination. [81]

ROBERT W. MORRIS

having been previously duly sworn, resumed the stand and testified as follows:

Cross-Examination
(Continued)

By Mr. Pomeroy:

Q. Captain Morris, did you have any warrant of arrest at the time you made the arrest of Ruis Parker? A. No, sir.

Q. Did you have any search warrant to go into 1219 and ½ Yesler Way? A. No.

Q. Did you have any search warrant to go into the apartment known as Apartment B?

A. No, sir.

Q. You were armed with no search warrants at all on that particular evening?

A. That is correct.

Q. Now, can you explain what arrangement you had, if any—working arrangement—with the Federal Bureau of Narcotics in November, 1948?

Mr. Dore: I object to this, Your Honor, as not proper cross-examination, having not been brought out in direct examination.

The Court: The objection is overruled. [82]

A. We have never had any arrangements since I have been in charge of the Felony Squad, which includes narcotics, which has been over a year and a half ago. A year ago last December we started the Felony Squad. During that time about—I don't know the exact number—I would say offhand maybe three-fourths of our cases we turn over to the Fed-

(Testimony of Robert W. Morris.)

erals because it saves us a little work in prosecuting the cases. During that time they have never collaborated or exchanged information or anything else, except in cases of this nature we have turned them over to the Federals to prosecute. That was merely to save us a little work.

Q. What was your regular procedure if you arrested a man on a narcotics charge such as you arrested Ruis Parker in November, 1948? What was your procedure with regard to the Federal Bureau of Narcotics?

A. Well, if we arrested them on a narcotics charge, we would call them up the next day and ask them if they wanted to handle the case, or the day after, and if they didn't we would give it to the State. It didn't make any difference to us, whom we turned them over to. We would call them up the next day and ask if they wanted to handle the case.

The Court: Will you try and repeat word for word and more slowly, your answer? [83]

A. We have no arrangements with the Federal Bureau. The day after we make an arrest, whether by the Felony Squad or anybody else in the police department, sometimes we call up and ask them if they want to adopt the case. And they come down and look over the evidence and decide if they want to adopt it or not.

Q. (By Mr. Pomeroy): Captain Morris, I will ask you whether or not on March 18, 1949, in the United States District Court in this building, in

(Testimony of Robert W. Morris.)

Judge Black's courtroom, in the case of the United States of America versus Alvenia Newman, in a hearing on a motion to suppress evidence, you were asked this question:—this is a question by me, and your answer will also follow, and I am reading now from what I believe to be what the statement was—"By agreement—I will ask you whether or not you are referring to an agreement as to federal officers prosecuting cases that you make? Is there any such agreement?" Your answer to that question was: "I can explain how the situation is. When we make a case, we call up the next day and ask them if they want to take it over, and tell them if they do not we will turn it over to a State court." Now, is that your answer to the question as given at that time?

A. Well approximately, I imagine. [84] I don't know—was that the way I worded it from the notes?

Q. I am asking you whether or not your recollection is that that statement was made.

A. Well, it sounded very similar to that statement.

Q. And was that statement correct as to your procedure during November of 1948?

A. Well, I don't necessarily always ask them first if they want to handle it and then turn it over to the State. Sometimes we do for no reason at all, turn it over to the State first, but we do usually turn it over to the Federals.

Q. In other words, your procedure, though, Captain Morris, is to call the Federal Bureau of Nar-

cotics as soon as you make a case and ask them if they want it? A. The next day, usually.

Q. And then they say whether they want it or do not want it? A. That is right.

Q. That is the situation. And then the officers making the arrest then become federal witnesses on those federal cases, is that right?

A. I don't know about that. What do you mean by "federal witnesses"?—for the Federal Narcotics Bureau?

Q. That is what I mean. That is correct, is it not? [85] A. Yes, sir.

Mr. Pomeroy: That is all.

Mr. Dore: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Dore: I call Robert R. Musselman.

The Court: Take the witness chair, Mr. Musselman.

ROBERT R. MUSSELMAN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dore:

Q. State your name, please.

(Testimony of Robert W. Morris.)

A. Robert R. Musselman.

Q. How do you spell your last name, Mr. Musselman? A. M-u-s-s-e-l-m-a-n.

Q. What is your address or residence?

A. 6542 MacArthur Court.

Q. What is your business or occupation?

A. I am a police officer with the Seattle police department.

Q. How long have you been with the Seattle police department? [86] A. Four Years.

The Court: Is it Robert L.?

The Witness: Robert R.

The Court: You may inquire.

Q. (By Mr. Dore): How long have you been with them? A. Four years.

Q. And with what detail are you now working?

A. At the present time I am with the Homicide and Robbery Detail.

Q. I couldn't hear that.

A. I say, at the present time I am with the Homicide and Robbery Detail.

Q. And were you so employed on November the 24th, 1948?

A. At that time I was assigned to the Felon Detail.

Q. Were you working under Captain Morris at that time?

A. He was my commanding officer.

Q. About 9:00 or 9:30 on the evening of Novem-

(Testimony of Robert R. Musselman.)

ber the 24th did you receive orders to proceed to 1219 and ½ Yesler Way?

A. No, sir. I was told to meet Captain Morris at 12th and Yesler.

Q. At 12th and Yesler? A. Yes, sir.

Q. Who told you that? [87]

A. Captain Morris.

Q. And did you go to 12th and Yesler?

A. I did.

Q. Who was there upon your arrival?

A. Detective Ivy, who was my partner at that time, and myself drove up in our car. Detective Waitt and Zuarri were either there or arrived about the same time. I don't know whether they were there or not.

Q. Was Captain Morris there?

A. I met Captain Morris at the corner immediately upon my arrival.

Q. About how much time did it take you to go from the Seattle police department up to 12th and Yesler?

A. Well, from the time he told us to meet him there, I believe it was—oh, it must have been all of five minutes. We had to draw a car from the motor pool and drive up there. It is not too far.

Q. Now, after you arrived there, what did you do?

A. The Captain led us down to 1219 and ½ Yesler Way and directed Detective Waitt and I to accompany him.

(Testimony of Robert R. Musselman.)

Q. And did you accompany him?

A. We did.

Q. Where did you go?

A. He opened the door of that address and we went up, I believe, two flights of stairs. [88]

Q. Now, that door was located where?

A. As I recall now, as we stood from the sidewalk, facing the building, it was on the left hand side of the building.

Q. Was the door locked?

A. No, sir; I don't believe it was because he opened the door and we walked in.

Q. How far were you behind him at the time?

A. Well, I followed Detective Waitt up the stairs and he followed Captain Morris, and we were all fairly close together. The exact distance I couldn't state.

Q. Well, approximately the distance. I am not asking for the exact distance.

A. Captain Morris' position from my position, I doubt if there was over—if it was over six or eight feet.

Q. After you went up the stairs, where did you go?

A. We went directly to the top of the stairs.

Q. What happened at that time?

A. On the left hand side of the stairways was a door. The Captain called out, "Is anybody home?" I believe he called several times. And he lead the way into the apartment.

(Testimony of Robert R. Musselman.)

Q. Was that door open or closed?

A. I definitely couldn't say. I was behind. I don't know whether the door was open or closed.

Q. Did you see any lights in the apartment there? A. In the apartment itself?

Q. Yes.

A. I don't recall whether the lights in the front of the building were on or not. There was a light on in the bathroom, which I went to eventually.

Q. What happened after you went in?

A. The Captain and Detective Waitt went to a room—went from the living room to the dining room. On the left hand side of the dining room was a door. They opened that door and went in. I continued on through the dining room into the kitchen. I looked around, and on my left I saw a door. That door lead to the bathroom. And I went into the bathroom. There was another door in the bathroom which lead to the defendant's bedroom. I went into the bedroom by that route.

Q. And did you see the defendant there?

A. I did, yes.

Q. Where was he?

A. He was lying on the bed.

Q. Did he say anything?

A. No—not to me, no.

Q. Did he say anything to anybody in your presence?

A. At that time I don't recall any conversation with the [90] defendant.

(Testimony of Robert R. Musselman.)

Q. Now, what occurred after you went into that room?

A. Well, on the bed was an opium smoking outfit; and the defendant, I believe, was told to get up and get dressed.

Q. Who told him that?

A. I believe it was the Captain.

Q. And did he get up and get dressed?

A. Well, he got up and was taken out of the room. Now, I don't know whether he got dressed at that time or not.

Q. Then what occurred?

A. The Captain directed us to search the apartment, which we proceeded to do.

Q. Did you search the apartment?

A. We did, yes.

Q. Did you personally find anything?

A. No, sir.

Q. Now, did you, while you were in the apartment, have any conversation with the defendant?

A. No, I don't believe so.

Q. Were you present at any time anybody else in the apartment had conversation with the defendant? A. No, sir.

Q. Did the defendant ride in your car down to the police [91] station?

A. No, sir; I don't believe he did.

Mr. Dore: Your witness.

(Testimony of Robert R. Musselman.)

Cross-Examination

By Mr. Pomeroy:

Q. Where did you park your car when you got there?

A. On the corner of 12th and Yesler.

Q. On the corner of 12th and Yesler?

A. Yes, sir.

Q. What corner was it?

A. Well, it would be on the northeast.

Q. On the north——

A. The northeast side of the intersection. I guess it would actually be on 12th Avenue.

Q. Oh, you parked your car on 12th Avenue?

A. Yes.

Q. And how close to the corner did you park the car?

A. I can't recall at this time the exact distance.

Q. Well, would you say it was closer to Yesler Way or the street north?

A. I would say it was closer to Yesler Way.

Q. Would you say it was about in the center of the block?

A. I can't definitely say the exact position the car was in. [92]

Q. You would not say that the car was not in the center of the block, would you?

A. I would neither say the car was in the center of the block or that it was not in the center of the block; I don't know.

Mr. Pomeroy: That is all.

Mr. Dore: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Pomeroy: If Your Honor please, I have a witness for the defendant, George Mosler, an attorney, a member of this bar, who must leave for Vancouver at 3:00 o'clock. It is a little out of order, but I would—he is a very short witness and I would like to put his testimony on.

The Court: How many more witnesses does the plaintiff have in this case?

Mr. Dore: There are four more witnesses, Your Honor, but their testimony will be brief.

The Court: Does the government consent that the defendant may call the proposed witness out of order?

Mr. Dore: The government so consents, Your Honor.

The Court: The Court approves, and you may do that, [93] Mr. Pomeroy.

Mr. Pomeroy: Thank you, Your Honor.

GEORGE R. MOSLER

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court?

A. George R. Mosler.

Q. And what is your occupation?

A. I am an attorney at law.

Q. And where do you practive law?

A. In Seattle.

Q. Mr. Mosler, are you familiar with the premises known as 1219 and ½ Yesler Way?

A. Yes, I am.

Q. Over how long a period of time?

A. Since the date of my birth. It will be 39 years next month.

Q. About 39 years ago. Now, Mr. Moser, did you, yourself, own these premises?

A. Yes, I did.

Q. Until when?

A. Until September of 1945. [94]

Q. And then what did you do with the premises?

A. I made a conditional sale of those buildings to Robert D. Lee.

Q. And are you still familiar with the premises?

A. Yes, I am very familiar with them.

Q. And this 1219 and ½ Yesler Way, is it an apartment building?

(Testimony of George R. Mosler.)

A. It is the front of an apartment building.

Q. It is what?

A. It is the front door—the front entrance of an apartment building.

Q. And how many apartments are there in there?

A. 1219 and ½ has two apartments.

Q. And where are those apartments located with reference to the building?

A. They are on the second and third floors of this building. If I might describe the building——

Q. You may briefly do so.

A. It is a rather unusual type of building. 1219 and ½ Yesler Way is what we call—well, the lower portion, or the street portion, has a store, which is now occupied by a lundry and dry cleaner, and 1219 and ½ describes the two street apartments. There are six more units in the same building in the rear which have separate entrances other than 1219 and ½. [95] 1219 and ½ has this front entrance and its own rear entrance.

Q. And then it has an apartment on the second floor and an apartment on the third floor?

A. That is correct.

Q. Those are the only apartments that can be entered through this door at 1219 and ½ Yesler?

A. That is correct.

Q. Do you know the defendant in this case, Ruis Parker? A. Yes, I do.

Q. Has he been a tenant in that building?

(Testimony of George R. Mosler.)

A. For many years.

Q. And he was one of your tenants, is that right? A. He was a tenant of mine.

Q. Now, can you tell this Court what the usual practice was concerning the front door known as 1219 and ½ Wesler Way?

A. The usual practice——

Mr. Dore: I object to this, Your Honor, until he fixes the time.

Q. During the period of—well, 1948—during 1948.

The Court: Do you ask him during the whole of 1948?

Q. Well, during November of 1948, what was the practice concerning the front door? [96]

A. During November of 1948 the practice was to keep that door locked at all times, the keys being under the control of the manager of the apartment house, the owner of the building and the tenants of apartments B and C.

Q. That would be the two tenants?

A. That would be the two tenants.

Q. And is that any different than the procedure you had in that building during the time you have known it? A. There was no difference.

Q. That has always been the practice?

A. That has always been the practice.

Mr. Pomeroy: You may inquire.

(Testimony of George R. Mosler.)

Cross-Examination

By Mr. Dore:

Q. Where do you now live?

A. I live at 512 Wellington Avenue, Seattle.

Q. Where is that in relation to 1219 and ½ Yesler Way?

A. That is approximately two to two and one-half miles east of 1219 and ½ Yesler Way.

Q. Do you and your family live there?

A. Yes; for many years.

Q. And do you work during the day?

A. Yes. [97]

Q. What are your working hours?

A. My working hours are irregular, Counsel. I am my own employer, but I generally—I am at my office from the hour of 9:00 until 4:30, unless I am engaged in Court.

Q. Where is your office located?

A. 2207 Northern Life Tower.

Q. And how far is that from 1219 and ½ Yesler Way?

A. I would approximate that at one and one-half miles.

Q. And what is your custom and procedure as to going home after the working day?

A. I either drive home in my automobile or else I will take a Number 2 Madrona bus to the end of the line where my wife will meet me with her automobile and take me home.

(Testimony of George R. Mosler.)

Q. And when you drive home, what is your customary route?

A. I have no customary route, Counsel. I do not like to get in the rut and I either go up Seneca Street and out East Union to 34th and north to Madrona Drive and east to the Boulevard, south three blocks, up Wellington Avenue, or else I will drive up Seneca Street to Boren Avenue, proceed south to Yesler Way, out Yesler Way to 32nd North and east to my home.

Q. Now, when did you sell this property to Mr. Lee?

A. September of 1945. I think it was within a day or two [98] either way of V-J Day.

Q. Now, since that time, considering your testimony that was given here concerning your working hours, in fact, the route that you pursued toward home, it isn't customary for you to visit 1219 and ½ Yesler Way, is it?

A. I do from time to time—for very obvious reasons.

Q. What are the reasons?

A. I still own the fee of that property, and I have a considerable sum of money due me there.

Q. How often during a month would you say that you stop in there?

A. Oh, I couldn't say by the month. I would say I would stop in there from 12 to 15 times a year.

Q. Are you familiar with the present lock upon the door?

(Testimony of George R. Mosler.)

A. Superficially I am, Counsel.

Q. What do you mean by that?

A. I mean the outer portion of the lock, which looks the same as it has always appeared.

Q. Now, were you familiar with the lock and the workings of the lock on November the 24th, 1948?

A. No, I would not say that I was accurately advised of that.

Q. Now, as to your knowledge concerning that lock, when you last were there and acquainted with the lock, was it an automatic lock? [99]

A. It was what I would call a Yale lock. I do not know whether Yale was the manufacturer's name, but it is a Yale type lock.

Q. Now, to your knowledge, on November 24th, 1948, or thereabouts, was there any automatic arm or spring or such contrivance which automatically closed the door if it was opened?

A. Yes; there was a spring. To the best of my knowledge and belief, there was a spring.

Q. Where was that located?

A. It would be on the upper inside portion of the door.

Q. Have you recently observed the door?

A. Not for the last three or four months have I made a close observation of that door.

Q. There is no spring there now, is there?

A. I do not know, Counsel.

Mr. Dore: That is all.

(Testimony of George R. Mosler.)

Mr. Pomeroy: No questions. You may step down.

The Witness: May I be excused?

The Court: The witness asks to be permanently excused, as the Court understands the request. Is there any objection?

Mr. Pomeroy: I ask that he be permitted to do so.

Mr. Dore: No objection.

The Court: The witness is permanently discharged [100] from attending the trial of this case.

(Witness excused.)

Mr. Dore: Henry L. Giordano.

HENRY L. GIORDANO

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dore:

Q. State your name.

A. Henry L. Giordano.

Q. And what is your residence?

A. Seattle, Washington.

Q. And your address?

A. 8203 41st Northeast.

Q. And what is your business?

(Testimony of Henry L. Giordano.)

A. Narcotic agent with the Bureau of Narcotics, Seattle, Washington.

Q. Were you so employed on or about November the 24th, 1948? A. Yes, sir.

Q. And did you have occasion subsequent to that date, or on or about that date, to make an investigation of the Ruis Parker case? [101]

A. Yes. On November 26th, 1948, I was instructed by Mr. Chrysler to go to the police station and see one of the police officers down there in regards to some person who had been arrested.

Q. What did you do by way of investigation?——

A. I went to the police station.

Q. ——that is, without relating any conversations with anybody.

A. Yes. I went to the police station and met one of the officers there, and then I went to the property room, and I obtained from the property room evidence from the property clerk, Mr. O'Leary. After I obtained that evidence, I went up and talked to Mr. Parker and questioned him in regards to this evidence I had.

Q. Where was Mr. Parker at the time?

A. He was in the City jail.

Q. And what date was that?

A. That was on the 26th of November, 1948.

Q. And what conversation did you have with him at that time?

A. I had some—an opium pipe and parapher-

(Testimony of Henry L. Giordano.)

nalia, and a jar of opium, and some Yen Shee in my possession then that I obtained from the property clerk, and I asked him whose property it was. I understood——

Q. At this time I might ask you to direct your attention [102] to Plaintiff's Exhibits 1 and 2, and the envelope there is Plaintiff's Exhibit 3 for identification. Are those the objects of which you speak at this time?

A. Yes. All of these exhibits were in my possession at that time.

Q. And what conversation did you have with Mr. Parker? What was said at that time?

A. Well, I asked him whose opium it was that was found in his apartment. And he said that it was his. And I asked him where he had purchased it, and he said he bought it from a chinaman. I asked him what the name of this chinese person was, and he said he didn't know the name. I asked him how long he had been using narcotics, and he said he had been using it about 15 months. And I asked how much he was paying for the opium, and he said that it was costing him a hundred dollars a jar and that he used about a jar every five days. I asked him what happened on the evening that the officers found this evidence, and he said he was in bed at the time and the first thing he knew the officers were in the room; and they found this platter here—plate—with all the smoking equipment and the opium on it.

(Testimony of Henry L. Giordano.)

Q. Did you have any further conversation with him at that time? [103]

A. That's all—I think that's all. I can't recall any other.

Q. Did you, after that date, have a conversation with him concerning this?

A. No; I think that's the only occasion that I talked to him.

Q. That is the only time that you talked to him?

A. Yes.

Q. Now, what did you do with these items here?

A. I brought them back to the office. And those items that contain narcotics, such as the smoking opium and the Yen Shee, I weighed them and sealed them in this envelope. That was—one jar had smoking opium.

Q. You sealed them in the envelope marked Plaintiff's Exhibit 3 for identification?

A. Two—Exhibit 2.

The Court: Look at it and see if the clerk's mark is there.

The Witness: It is marked 2.

Mr. Dore: It should be 3, Your Honor.

The Court: That is my understanding. My notes indicate that it should be marked Plaintiff's Exhibit 3. Six jars and one small tin are the things that make up Plaintiff's Exhibit 2, according to my notes.

Mr. Dore: Yes. [104]

(Testimony of Henry L. Giordano.)

The Court: The wrapper, it is Plaintiff's 3 for identification.

Q. (By Mr. Dore): Which envelope was it, Mr. Giordano?

A. It was Exhibit 2. The one marked Exhibit 3 is the envelope that the police officers had placed this evidence in. And I had opened this and removed those items that contained a narcotic drug and placed them in this envelope along with this one folded up. Exhibit 2—they were all eventually placed in Exhibit 2.

Q. What did you do with the other equipment?

A. The other equipment I wrapped up, and sealed, and kept it in my possession.

Q. And it has been in your possession ever since—until trial day? A. Yes, sir.

Q. Now, what did you do after that?

A. Well, then I took the evidence that I placed in Plaintiff's Exhibit 2, the jars, six jars and the tin, and took them to Mr. Hugo Ringstrom, the United States chemist.

Q. Where was his office?

A. In the Federal Office Building.

Q. What day did you take it to him?

A. I don't recall the day that I took it to him. [105]

Q. Did you request an analysis of the substance at that time? A. Yes, sir.

Q. Now, in weighing the narcotics—you say that you weighed the narcotics—what weight did you discover?

(Testimony of Henry L. Giordano.)

A. Well, on the jar containing the opium, it was approximately 292 grains of smoking opium, and the tin, "Nature's Remedy tin, it contained about 17 grains of Yen Shee; and then there was one jar that had some Yen Shee in it. It was 50 grains of Yen Shee in that one jar, and another jar had eight grains of Yen Shee. Each of those were enclosed in some newspaper.

Q. What was the total amount of Yen Shee that was weighed? A. It would be about 75 grains.

Q. And did you turn the Yen Shee over to Hugo Ringstrom, also? A. Yes, sir.

Q. Are you familiar with the difference between smoking and non-smoking opium?

A. Yes, sir.

Q. What is the difference?

A. The non-smoking is opium that has not been prepared. It is usually in a crude form, brick form, or a solid form.

Q. How about the smoking opium? [106]

A. The smoking opium is like an extract, liquid partially—kind of a heavy syrupy form.

Mr. Dore: Your witness.

Mr. Pomeroy: No questions.

(Witness excused.)

Mr. Dore: I call Hugo Ringstrom.

The Court: As I understand it, the defendant does not wish to cross-examine Mr. Giordano.

Mr. Pomeroy: I stated, "No questions."

The Court: Call your next witness.

HUGO RINGSTROM

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dore:

Q. State your full name, please.

A. Hugo Ringstrom.

Q. And where do you live, sir?

A. Seattle, Washington.

Q. What is your business or occupation?

A. Chemist for the Alcohol Tax Unit, federal government.

Q. How long have you been a chemist for the government? A. 26 years. [107]

Q. And were you a chemist for private industry at any time? A. Yes, sir.

Q. How many years? A. Two years.

Mr. Pomeroy: I will stipulate as to the witness' qualifications.

Mr. Dore: I believe the Court is familiar with his qualifications, also, Your Honor.

The Court: I am. As far as the Court is concerned, that need not be proved.

Q. (By Mr. Dore): Now, in the course of your work, were you called upon to make an analysis of certain evidence in regard to the United States of America versus Ruis Parker? A. Yes, sir.

Q. Before you there are Plaintiff's Exhibits 2

(Testimony of Hugo Ringstrom.)

and 3. Did you make an analysis of any of those items or substances before you?

A. Well, I made an examination of the—the envelope is marked as Exhibit 2.

Q. That is the envelope that contained the six jars and the small tin? A. Yes, sir.

Q. And at whose request did you make this examination? [108]

A. The bureau of Narcotics.

Q. What agent or representative of that bureau?

A. Narcotic Agent Giordano.

Q. And when did he ask you to make that analysis? A. December the 9th, 1948?

Q. Where was that?

A. In the Alcohol Tax Unit laboratory, Seattle, Washington.

Q. And did you make a chemical analysis of the substances given to you by Mr. Giordano?

A. Yes, sir.

Q. And when did you make that analysis?

A. Oh, a day or two after he brought it down.

Q. What were your findings?

A. This jar here contained approximately 150 grains of smoking opium.

Q. Can you identify that jar by any marking, to make it more definite?

A. I don't see any marks except the initials on it.

Q. Is that how you identify it as being the jar that contained the opium?

A. My initials, and the figure "150 grains."

(Testimony of Hugo Ringstrom.)

Q. What are your initials, please?

A. H. R.

The Court: Is it a part of some numbered exhibit? [109]

The Witness: It was contained in this envelope—Exhibit 2.

Q. You say there were 100 grains in this jar?

A. 150.

Q. 150? A. Approximately.

Q. And as to the other jars or tins there?

A. The tin contained 50 grains of Yen Shee, and this jar contained 17 grains of Yen Shee.

Q. How was that jar marked?

A. With my initials and 17 grains. And this jar contained eight grains of Yen Shee. And these other three jars contained traces of smoking opium in them.

Q. Was there any other substance there that you made an analysis of?

A. Not that I recall.

Q. What did you do with that equipment there, or substance and those items after you had analyzed them?

A. I kept them in my possession until this morning.

Q. Those are the items that were in the envelope marked Plaintiff's Exhibit 2, is that correct?

A. Yes, sir.

Mr. Dore: Your witness.

Mr. Pomeroy: No questions.

The Court: You may be excused from the stand. [110]

(Witness excused.)

Mr. Dore: I call Joseph B. Goode.

JOSEPH B. GOODE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dore:

Q. State your full name, please, Mr. Goode?

A. Joseph B. Goode.

Q. And where do you live, sir?

A. Seattle.

Q. What is your business or occupation?

A. Federal Narcotic Agent.

Q. And I will ask you if you had any occasion to investigate the case of the United States of America versus Ruis Parker? A. I did.

Q. And when was that?

A. Sometime in May; I don't remember the date.

Q. At whose request?

A. The district attorney, Mr. Vaughn Evans.

Q. And what did you do by way of investigation?

A. We went down to the address on Yesler Way.

(Testimony of Joseph B. Goode.)

Q. Here in the City of Seattle? [111]

A. Yes, sir; 1219 and ½.

Q. What did you do there?

A. We attempted to see Mr. Lee, and we could not find him at home there—I mean at that place.

Q. Mr. Lee is the landlord of that place?

A. That is right.

Q. And then what did you do?

A. We went over to 1635 King Street.

Q. Did you speak to Mr. Lee there?

A. He was there.

Q. And was Ruis Parker there?

A. No, sir.

Q. Now, what did you do after speaking to Mr. Lee?

A. We talked to him about the doorway that went up in his apartment which he owned.

The Court: Which doorway? Where?

The Witness: At 1219 and ½.

Q. Now, did you personally observe that doorway? A. I did from the outside.

Q. Did you open the door?

A. No, I did not.

Q. Was the door locked or unlocked when you were there?

A. It was locked at that time, sir.

Q. It was locked at that time?

A. Yes, sir. [112]

(Testimony of Joseph B. Goode.)

Q. And have you ever observed that door since that time?

A. I have been there again. He's got the two doorways at 1219 and ½ and 1231.

The Court: What street?

The Witness: At Yesler Way.

Q. I am speaking of the doorway at 1219 and ½ Yesler Way. A. It was locked.

Q. And have you ever observed it since that time when you first saw it?

A. No, I have not—except last night.

Q. What was the condition of the door when you observed it last night? A. It was locked.

Q. It was locked at that time?

A. Yes, sir.

Q. And have you ever talked to Ruis Parker?

A. I have not.

Q. What else did you do by way of investigating?

A. The only thing in the investigation, we talked to Mr. Lee, and he explained the lock on this door as a similar lock that was on the other apartment.

Q. What type of lock was on his door?

A. One of those snap locks on the inside. You could turn it off, and when you turn it off the lock would [113] be open, you see.

Q. In other words, there is a little latch on the side there? A. That is right; yes.

Q. And do you turn it or is it the type that goes up or down?

(Testimony of Joseph B. Goode.)

Mr. Pomeroy: May I ask, are you describing the lock at 1219 and ½ Yesler Way?

The Witness: No; describing the lock Mr. Lee showed me as a similar lock at 1219 and ½ Yesler Way.

Mr. Pomeroy: I will object to that.

The Court: Sustained.

Mr. Dore: No further questions.

Mr. Pomeroy: No questions.

The Court: Step down.

(Witness Excused)

The Court: Call your next witness.

Mr. Dore: Mr. O'Leary.

THOMAS FRANCIS O'LEARY

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dore:

Q. State your full name, please, Mr. O'Leary.

A. Thomas Francis O'Leary.

The Court: Pardon?

The Witness: Thomas Francis O'Leary.

Q. And where do you live?

A. At 2017 11th Avenue North.

Q. And what is your business?

A. Police officer, City of Seattle.

(Testimony of Thomas Francis O'Leary.)

Q. How long have you been so employed?

A. Six years past.

Q. And what are your duties?

A. I am in charge of the property room.

Q. And being in charge of the property room, what does that encompass? What is the nature of the duty?

A. Well, we handle all police supplies and equipment.

Q. Now, you have before you——

The Court: You have not said anything material yet. I do not believe there is an issue——

Mr. Dore: I just wanted him to identify the envelope, Your Honor.

The Court: Well, he has not said that his duty encompasses anything that is here involved yet, Mr. Dore. Do you wish to give him an opportunity to do that? I did not hear him say that——

Mr. Dore: I want him to refer to the envelope, Your Honor, Plaintiff's Exhibit for identification No. 3. [115]

The Court: Well, I was calling your attention to the fact that so far nothing yet has been said by this witness as to what his usual duties are; nothing has been said which encompasses any duty respecting these exhibits.

Mr. Dore: That is what I want to do now, Your Honor.

The Court: All right; you may proceed.

Q. (By Mr. Dore): There is an envelope there before you.

(Testimony of Thomas Francis O'Leary.)

Mr. Dore: I wish somebody would point it out to him.

The Court: Look at the envelope before you.

(Bailiff indicates envelope in question to witness.)

Q. (By Mr. Dore): Can you identify that envelope?

Mr. Pomeroy: Well, if Your Honor please, I hate to object in this particular matter because I do not think it is important, but apparently there is a—well, an envelope was picked up and handed to him and it is not referred to by number.

Mr. Dore: I referred to it as Number 3, Your Honor.

The Court: Very well; let the record—let me see that. Let the record show that the witness' attention has been called to Plaintiff's Exhibit No. 3 for identification.

A. This an envelope that we use for narcotics; and it is given to us, I believe, by the Treasury Department to put narcotics in.

Q. Now, on or about November the 24th, 1948, did you personally receive any of these items there, or any of the envelopes containing those items?

A. I received the items and placed them in the envelope.

Q. You did? A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. Did you initial, or make any marking of any

(Testimony of Thomas Francis O'Leary.)

sort, or anything else on the envelope to show that you did that?

A. Yes. We are instructed to not the time we receive it.

Q. Is that so noted? A. Yes, it is.

Q. Where?

A. On the back of the envelope.

Q. And what is stated there? What is written?

A. Received November 24, 1948, at 11:25 p.m., and it is signed by me.

Mr. Dore: Your witness. [117]

Mr. Pomeroy: No questions.

Mr. Dore: That is all.

The Court: Step down.

(Witness Excused)

The Court: Call your next witness.

Mr. Dore: That is the government's case, your Honor.

The Court: Well, I call the government's counsel's attention to the fact that there are several exhibits which have been referred to.

Mr. Dore: I will offer those exhibits in evidence, Your Honor, at this time.

The Court: Plaintiff's Exhibit 1 has not yet been offered. Plaintiff's Exhibit 2 has not yet been offered. Plaintiff's Exhibit 3 has not been offered, unless it was in the last word or two.

Mr. Dore: I will at this time offer them, Your Honor, with the Court's permission.

Mr. Pomeroy: Objected to, if Your Honor

please, on the grounds that they were obtained by unlawful search and seizure.

The Court: Do you wish to call the Court's attention to any decision which you think supports your theory?

Mr. Pomeroy: Yes. [118]

(Argument by counsel)

The Court: The objection to the offer of these exhibits, 1, 2 and 3, is overruled and each of those exhibits is now admitted in evidence.

(Plaintiff's Exhibit 1, 2 and 3 admitted in evidence.)

Mr. Dore: The government rests at this time, Your Honor.

The Court: Plaintiff rests. The defendant may now proceed.

Mr. Pomeroy: I will call Lottie Morgan.

LOTTIE MORGAN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Lottie Morgan.

Q. And where do you live, Mrs. Morgan?

(Testimony of Lottie Morgan.)

A. 1219 and ½ Yesler—Apartment A.

Q. And where is your apartment located in the building? A. The second floor.

Q. How many apartments are there in the building? A. Two. [119]

Q. And where is the other apartment—not yours—located? A. The third floor.

Q. How long have you lived at that address?

A. Eight years.

Q. Do you know the occupants of the other apartment? A. Do I know——

Q. Do you know who lives in the other apartment? A. Yes, I do.

Q. And who is that? A. Mr. Parker.

Q. Ruis Parker, the defendant in this case?

A. The defendant.

Q. And were you a tenant there in November, 1948? A. I was.

Q. And was Mr. Parker a tenant in the other apartment on that same date? A. He was.

Q. In November, 1948? A. He was.

Q. What is the situation with regard to the front door of the apartment building; is that kept locked or is it kept unlocked?

A. It is kept locked at all times.

Q. And has that been true during your entire tenancy there? [120] A. It has.

Q. And do you know who has keys to that door?

A. Mr. Parker and myself.

(Testimony of Lottie Morgan.)

Q. Anyone else? The manager of the building?

A. The manager of the building, yes. No one else.

Q. At any time during the period you lived there has that door been unlocked? A. Never.

Mr. Pomeroy: You may inquire.

Cross-Examination

By Mr. Dore:

Q. Where do you live in relation to the apartment of Ruis Parker?

A. 1219 and ½ Yesler Way, Apartment A, the second floor.

Q. They are both on the second floor there?

A. No.

Q. Apartments A and B are together on the second floor? A. Not the second floor, no.

Q. Where is Apartment B?

A. On the third floor.

Q. On the third floor? A. Yes.

Q. And you are beneath his apartment?

A. That is right. [121]

Q. Now, are you in your apartment at all times during the day?

A. Not at all times. I work.

Q. Where do you work?

A. I do house work.

Q. How many days a week do you work?

(Testimony of Lottie Morgan.)

A. At the time of November I were doing maid work at night.

Q. At night.

A. I go to work at 4:00 o'clock in the evening.

Q. When did you leave there in the evening?

A. At 4:00 o'clock.

Q. At 4:00 o'clock. And when did you return?

A. I returned the next morning at 6:00.

Q. So you were not there between 4:00 in the afternoon and 6:00 the next morning, is that true?

A. That is true.

Q. So that you do not really know whether that door was locked or not between those hours, do you?

A. It was locked when I left and locked when I returned.

Q. But you do not know the condition of the lock during the time you were gone, do you?

A. No, I couldn't during the time I am gone because nobody else is supposed to have a key but Mr. Parker and myself. [122]

Q. Now, what kind of a lock is it?

A. A Yale lock.

Q. Is there a latch device on the lock by which you can either leave the lock unlocked or cause it to lock?

A. No. When you open it, it slams itself, but it doesn't have one of those things that—like those doors in the other room.

Q. Well, you are speaking of some automatic device up top?

(Testimony of Lottie Morgan.)

A. Yes. No, it doesn't have an automatic device.

Q. It has no automatic release? A. No.

Q. Or closing device? A. No.

Q. Does it have a spring?

A. When you open the door, it will close before you can step in it if you are not careful.

Q. Now, you say there is no automatic device on the door? A. No.

Q. Now, I am speaking of—my question was addressed to the lock itself. Is there any small latch device on the lock itself which when turned or pushed—— A. That can be turned off and on?

Q. Yes. A. Yes, there is. [123]

Q. Were you there with the police officers on November the 24th? A. No, I wasn't.

Mr. Dore: That is all.

Redirect Examination

By Mr. Pomeroy:

Q. Have you ever known that device, to leave the door unlocked, to be used? A. Never.

Mr. Pomeroy: That is all. You may step down.

(Witness Excused)

Mr. Pomeroy: Robert Lee.

ROBERT DeSHAY LEE

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. Will you state your name to the Court, please? A. Robert DeShay Lee.

Q. And where do you live, Mr. Lee.

A. 1635 King Street.

Q. And are you the owner of the premises known as [124] 1219 and ½ Yesler Way?

A. I am.

Q. How long have you been the owner of those premises? A. The 10th of September, 1945.

Q. That is when you bought them?

A. That's when I bought them.

Q. And you have been the landlord there ever since, is that correct? A. Yes, sir.

Q. That part of the building known as 1219 and ½ Yesler Way, how many apartments does that contain? A. That contains nine apartments.

Q. The door known as 1219 and ½ Yesler Way, how many apartments can be reached through that door? A. Two.

Q. And what apartments are they?

A. A and B.

Q. And that's the only two apartments that you go to through that door, is that right?

A. That is right.

(Testimony of Robert DeShay Lee.)

Q. And who lives in those apartments and did live there in November, 1948?

A. November, 1948?

Q. Yes.

A. Mr. Ruis Parker lives in Apartment B.

Q. And who lives in Apartment A?

A. Mrs. Morgan.

Q. What was the situation with regard to the front door of that place where those two tenants live known as 1219 and ½ Yesler Way with regard to whether or not it was kept locked or unlocked?

A. Well, it was locked. It was kept locked; yes, sir.

Q. It was kept locked all the time?

A. It was customary that the door be locked all the time.

Q. Do you know of any time when the door was unlocked?

A. No, I don't. You see, I don't live down there and the door is locked at all times, so far as I know.

Q. Who has the key to that door?

A. Well, the only person who has got a key to that door is Mr. Parker, Mrs. Morgan and the caretaker.

Q. And that is all? A. That is all.

Mr. Pomeroy: You may inquire.

Cross-Examination

By Mr. Dore:

Q. You are the landlord of this apartment, is that true? A. Yes, sir.

(Testimony of Robert DeShay Lee.)

Q. Do you live there at those apartments?

A. No, sir. [126]

Q. Where do you live?

A. 1635 King Street.

Q. How far is that from 1219 and ½?

A. Oh, that is seven or eight blocks.

Q. Now, speaking of the door, the street door of 1219½, does it have any automatic closing device, any springs or levers on it that causes the door to close?

A. No, I don't think it has a spring on it because —that causes it to close, but the door is a slanting like that. (Indicating) You can open the door and it will close back itself.

Q. I see. Now, speaking of the lock on that door, what kind of a lock is it?

A. It is what you might call a night latch, a slam lock. After the door shuts, the lock will automatically lock itself.

Q. Now, is there any small latch or device on that lock which when turned or pushed will cause the lock not to lock, or vice versa?

A. All night latches have a device on them that you can pull up and cause them not to lock.

Q. Were you there on November the 24th, at the time the police officers entered?

A. No, I wasn't.

Mr. Dore: That is all. [127]

Mr. Pomeroy: You may step down.

(Witness Excused)

The Court: Call your next witness.

Mr. Pomeroy: William Hawker.

WILLIAM J. HAWKER

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. State your name, please, for the Court.

A. William J. Hawker.

Q. And where do you live, Mr. Hawker?

A. 109 12th Avenue.

Q. 109 12th Avenue? A. Yes, sir.

Q. And were you living there on November 24th, 1948? A. Yes, sir.

Q. How long have you lived in Seattle, Mr. Hawker? A. I have been here about 35 years.

Q. And what business do you have?

A. I haven't any business now. I steamboated out of here, that is, you know, in the steward department. I railroaded out of here and—you know, followed [128] cooking and table waiting and such as that.

Q. And do you own any property here?

A. Yes, sir.

Q. What property do you own?

A. 109 12th Avenue.

Q. Where you live? A. Yes, sir.

(Testimony of William J. Hawker.)

Q. How long have you owned that property?

A. I bought it in the fall of '42, I think it were.

Q. All right. Now, Mr. Hawker——

Mr. Pomeroy: If Your Honor please, I would like to show him that map.

The Court: You may do that. Both counsels may approach the witness.

Q. (By Mr. Pomeroy): I am showing you what is marked as Defendant's Exhibit A-2 for identification which purports to be a map of the general area around where you live and where Yesler Way is at 12th Avenue and 14th Avenue. Do you recognize the streets as they are cut off there?

A. Right.

Q. 12th Avenue is right here and Yesler is here and here is 14th. Yes, sir.

Q. Now, where is your home with relation to this Exhibit [129] A-2? Could you make a little mark? And make that a "J."

A. Well, this is Yesler Way here.

Q. No, here is Yesler.

A. If that is Yesler Way here, I live right off of Yesler Way on this side, I would say. I live on the left hand side of the street going that way.

The Court: Going that way! What direction?

Q. He is indicating north.

A. Well, I don't know whether you would say north or not, but I know it is going direct this way; like you were going downtown.

(Testimony of William J. Hawker.)

The Court: Downtown? Going westerly from your place toward the waterfront?

The Witness: No. I live on 12th Avenue. Here is 12th Avenue right here. I live right there. It would be going down that way. There is a steam bath on this corner and I live at the next door.

Q. All right. Now, looking at this exhibit again, Mr. Hawker, this is Yesler Way and this is 12th Avenue. A. I understand that.

Q. Now, you say you live on this side of 12th Avenue?

A. I do—the left hand side going this way. (Indicating).

Q. Do you know on this map where Ruis Parker lives?

A. He lives on Yesler Way on the right hand side of the [130] street going towards 14th Street.

Q. Going towards 14th. Now, directing your attention to an item, on November 24th, 1948, did you see Ruis Parker on that night? A. I did.

Q. And where did you see him?

A. He was on the opposite side of the street to me.

Q. And where were you?

A. I was on the same side of the street that I lived on, and I could look across the street and see him, and I knowed him.

Q. And he was alone or with someone?

A. There was five men with him. There was three with him and there—there was five alto-

(Testimony of William J. Hawker.)

gether; three with him. And they carried him to a car and they put him in the car—at least he got in the car.

Q. Where was that car they took him to?

A. They took him on the right hand side of the street going out—going towards Fir Street.

Q. Going towards Fir Street? A. Yes, sir.

Q. On what street is that?—12th and——

A. That is 12th and Fir.

Q. And would you say that was in the center of the block or at the end of the block or—— [131]

A. Where they put him in the car was about in the center of the block, near where there is a barber —a Japanese barber shop and a Japanese flower— where they sell flowers at.

Q. That is between Yesler and Fir on 12th Avenue? A. Yes.

Q. About what time of the evening was that, do you know?

A. Well, I left 662 Jackson Street, the Elks Club, a little after 10:00 o'clock and I guess it was about 10:30.

Q. About 10:30?

A. I would judge that is what it was.

Q. And how long did you stand there watching Parker and these five men.

A. I watched them until they got in the car. And the other two, they went up to Fir and they disappeared. I don't know where they went.

(Testimony of William J. Hawker.)

Q. Two of them went up to Fir,—that is, two white fellows?

A. They were all white except Parker.

Mr. Pomeroy: You may inquire.

Mr. Dore: I have no questions.

Mr. Pomeroy: You may step down.

The Court: You may be excused from the witness chair.

(Witness excused.) [132]

The Court: Call your next witness.

Mr. Pomeroy: Ruis Parker.

RUIS PARKER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. State your name to the Court.

A. Ruis Parker.

Q. And you are the defendant in this action?

A. Yes, sir.

Q. How long have you lived at 1219 and ½ Yesler Way? A. Nine years.

Q. And how long has Lottie Morgan lived there in Apartment B?

A. Just about the same length of time, I think.

Q. Directing your attention to November 24th,

(Testimony of Ruis Parker.)

1948, what was the condition as to this front door to 1219 and ½ Yesler Way; was it locked or unlocked?

A. Well, I don't—I came in, in the morning, at 10:00 o'clock, and it was locked, and I went to my apartment and I slept all day and I never came out any more.

Q. In other words, you went to your apartment on the morning of the 24th, about 10:00 in the morning, and [133] remained in your apartment all day long, is that right? A. That's right.

Q. And the door was locked when you came in?

A. It was.

Q. And did you lock it after you came in or close it? A. It just automatically locks.

Q. I see. Do you know of any time you have lived there that the door has ever been unlocked?

A. Not since I have been there.

Q. And are there locks also on the door, to your apartment? A. There is.

Q. There is a lock on that door?

A. A spring lock.

Q. And on the day of November 24th, 1948, how was the lock on that door; was that locked or unlocked? A. It was locked.

Q. And it had been locked, had it, all day?

A. I hadn't been out all day. I locked it when I came in.

Q. And is there any time during the nine years

(Testimony of Ruis Parker.)
that you have lived there that you ever found that front door unlocked?

A. In the morning they used to have a houseman or janitor, I guess you would call him, who cleaned the halls, and [134] when he cleaned the halls, because he didn't have a key, he would leave the front door open, propped open because it was the only way he could keep it open in mopping out. That was the only time it was ever kept opened, when he was mopping the hall.

Q. Was he doing that in November, 1948?

A. No, sir.

Q. When was it he was doing that?

A. Well, he did it in the morning, but it wasn't that morning.

Q. It was not that morning?

A. No. I don't think they have a schedule now. I don't know what the schedule is. I don't think they have one now.

Q. On the evening of November 24th you were arrested by the officers who testified here, is that correct? A. Yes, sir.

Q. And when you were arrested, where did they take you after you left the apartment?

A. To the police station.

Q. Well, I know, but tell the Court the route of your going to this automobile that they took you down to the police station in. Where did you go?

A. After they finished searching me, they took the handcuffs off me and told me to put my clothes

(Testimony of Ruis Parker.)

on, and after [135] that we all left the apartment together and came down the stairs, and I think Captain Morris was in the lead, and all of us went to 12th and Yesler Way, to the corner, and turned right and waited for the small light. Oh, it was a matter of 10 or 15 seconds and then we crossed Yesler Way and went North on 12th Avenue to, oh, I would say 150 feet north of Yesler Way. And three officers put me in the car and the other two proceeded north.

Q. Now, Mr. Parker, I am showing you what is marked for identification as Defendant's Exhibit A-2. You know what this is, do you not?

A. Yes, I do.

Q. And you have seen it here in court before?

A. Yes, sir.

Q. And, you see, that "B" on there designates the place where you live. A. Yes, sir.

Q. Now, will you step over here and make a line showing the route which you took with the officers after leaving 1219 and ½ Yesler Way and then where you got into the automobile to go to the police station?

A. After we came out the door, they brought me down this side.

Q. Make an ink line. [136]

A. (Witness complies.) We came down to the corner and then this way to—I would say about there.

(Testimony of Ruis Parker.)

Q. Now, make a little round mark there.

A. (Witness complies.)

Q. And that is supposed to be the place where you got into the car to go to the police station?

A. Yes.

Q. Now, will you mark that "K"?

A. (Witness complies.)

Q. And the line which reads from "B" to "K" is the line that you have made which designates the route which was followed by you and the five police officers to the car which took you to the police station, is that right? A. That is true.

Q. Had anyone visited you the day of November 24, 1948? A. No, sir.

Q. You had been in this room all alone all that day, is that right? A. All day.

Q. Since 10:00 o'clock in the morning until the officers came? A. That is true.

Q. And the door, the front door to your apartment had never been opened by you or anybody else? [137] A. Not all day.

Q. It had been locked all day?

A. I awoke at 7:30 and got up and made coffee.

Q. Did you go back to bed?

A. No. I put this on the bed, (Indicating) and I know my door was locked at that time.

Q. I see.

Mr. Pomeroy: You may inquire.

(Testimony of Ruis Parker.)

Cross-Examination

By Mr. Dore:

Q. When did you stop smoking opium that day?

Mr. Pomeroy: I will object to that question, if Your Honor please, on the ground that it is improper cross-examination. There was no mention of opium on my direct.

The Court: Didn't he make some reference to "this"?

Mr. Dore: Yes, Your Honor.

The Court: The objection is overruled.

Mr. Pomeroy: I do not know what this "this" was. Maybe he just meant the plate. I don't know. "This" certainly does not say opium.

Q. (By Mr. Dore): When you said you put "this" on the bed, what did you mean by that? [138]

A. The coffee.

Q. The what?

A. My coffee. I made coffee.

Q. Well, you pointed to the things in front of you. A. I made a gesture.

The Court: The objection is sustained.

Mr. Dore: Yes, Your Honor.

Q. (By Mr. Dore): How long were you in bed?

A. When the officers arrived?

Q. Well, you said you were up in your apartment at approximately 10:00 o'clock in the morning.

A. In the morning? I got up at 7:30 and made coffee and brought the coffee in the bedroom, as it

(Testimony of Ruis Parker.)

is cold. I only have an electric heater in the apartment and I was lying listening to the radio.

Q. Were you in the apartment all day?

A. All day.

Q. How long were you in bed?

A. Until 7:30.

Q. 7:30 that evening? A. Yes, sir.

Q. Have you ever been convicted of a crime?

A. What kind of a crime?

Q. Any kind of a crime. A. Yes. [139]

Q. And what crime? A. Tending bar.

Q. When was that? A. Oh, several times.

Q. What years?

A. Oh, practically ever since I have been in Seattle the last time I worked more or less as a bartender.

Q. How long have you been in Seattle?

A. The last time I came here in 1938.

Q. Were you arrested for violation of the Steele Act in 1938? A. I don't recall.

The Court: Perhaps in your question you should advise him what you mean by the Steele Act or in some way identify what it is.

Q. Were you convicted for the offense of possessing liquor with intent to sell the same in 1938?

A. I don't believe so.

Q. Were you convicted in 1939? A. Yes.

Q. How many times in 1939?

A. I couldn't say. Twice a week I think it was.

Q. About twice a week? A. Yes.

(Testimony of Ruis Parker.)

Q. How many times in 1940? [140]

A. Oh, about the same amount,—when I was working.

Q. About twice a week?

A. Something like that.

Q. And in 1941, how many times were you convicted? A. I don't know.

Q. Well, approximately how many times?

A. Well, I only worked as a bartender until around the Easter season and I don't know how many times it happened before then.

Q. Do you recall being convicted on February the 25th, 1941? A. It is possible.

Q. And are there any other convictions?

A. I think one. After I came out of the service I was taken in preference to a bartender in a place. I was in because I did have such a record.

Q. What year was that?

A. That was in 1942.

Q. 1942. Were you convicted in 1943?

A. It was '43.

Q. 1943? A. Once, I believe.

Q. Were you convicted also on or about May 28th, 1943? A. That was the time.

Q. That was in Seattle here? [141]

A. It was.

Mr. Dore: No further questions.

Mr. Pomeroy: You may step down.

(Witness excused.)

Mr. Pomeroy: We will offer Defendant's Exhibit A-2.

Mr. Dore: Is that the chart?

Mr. Pomeroy: Yes.

Mr. Dore: No objection to the chart.

The Court: Defendant's Exhibit A-2 is now admitted.

(Defendant's Exhibit A-2 admitted in evidence.)

Mr. Pomeroy: I have no further witnesses, Your Honor.

The Court: Does the defendant rest?

Mr. Pomeroy: The defendant rests.

The Court: Any rebuttal?

Mr. Dore: No rebuttal, Your Honor.

May the witnesses be excused, Your Honor?

The Court: Is there any objection?

Mr. Pomeroy: No objection.

The Court: All witnesses in this case are excused permanently from appearing further at this trial.

(Testimony concluded.) [142]

The Court: How long do you wish to argue?

Mr. Pomeroy: I only need about ten minutes?

The Court: How much?

Mr. Pomeroy: About ten minutes.

The Court: How much does the plaintiff wish?

Mr. Dore: I request 30 minutes, Your Honor. I do not think I will use all that time, but I would like to have it, if necessary.

The Court: Each side may have 30 minutes, and the plaintiff may divide the 30 minutes allotted to it as between plaintiff's opening and closing argument.

I will now hear counsel from their present stations. Plaintiff may make its opening argument.

(Whereupon, arguments were made by respective counsel for the plaintiff and defendant.)

COURT'S DECISION

The Court: The proof before the Court in this case is that the front door to this apartment house was latched but not locked, and in order to enter the hallway all that had to be done was to turn the latch and walk in; that that was done pursuant to a telephone call to the police reporting a man dying, or a man poisoned, and thereafter the front door of the [143] apartment house was opened and the hallway entered by the police in that manner. Then after ascending the stairs, which was suggested by the informer over the telephone, the police found a door ajar with the defendant lying in bed in the room which was entered by that door that was ajar. And after they had gone into the room, and into the presence of the defendant who was lying in bed, the defendant pointed out the narcotics contraband, —called it to the attention of the officers. They were not searching for it at the time, did not know that it and the smoking opium paraphernalia were there until the defendant himself pointed it out and said "there it is."

There is nothing in those facts (and they are all the material facts which were testified to as to how his occurrence happened) that indicates unlawful search or seizure.

The circumstance that the Police Department personnel were the ones who developed this case, and after doing so turned the information concerning it over to the Federal authorities, may sometime inspire an appellate court having authority to change the rules to make such change. But so far as I know, under the rules now in effect and as they have existed during a substantial period of this country's judicial [144] history the circumstances here do not reflect any illegal association or cooperation between the police department of the City of Seattle and the Federal Narcotics Bureau. It is not within the authority of this Court, in my opinion, to hold in this case that there was any unlawful association or cooperation between those two law enforcement agencies. Should the Supreme Court of the United States decide to change the rules and declare that such action as was here taken by the police department and, that such consideration as the Narcotics Bureau later gave to the case, were improper, if that Court should hold that as a result thereof the action was an unlawful association and cooperation between those agencies, then that is a matter for such Appellate Court to so conclude, but it is not, in my opinion, within the authority of this Court to conclude that there was any such unlawful cooperation or association.

On the other hand, according to past judicial precedents applicable to the facts here, what was done in this case was lawful and appropriate and in all respects in order, so far as I am advised.

Accordingly, this Court does, in accordance with the rules relating to a trial before the Court without a jury, which is the situation here, and in accordance [145] with the evidence in this case, now make the general finding that the allegations of the indictment, and particularly Count I thereof, that being the only count, are sustained by the evidence;

And the Court does further specifically find from the evidence, beyond a reasonable doubt, that on or about the 24th day of November, 1948, at Seattle, in the Western District of Washington, Northern Division, Ruis Parker, the defendant in this case, did knowingly receive and conceal a quantity of narcotic drugs, to-wit: 294 grains of opium prepared for smoking and 75 grains of Yen Shee, knowing the same to have been imported into the United States contrary to law and that the defendant is guilty and is now convicted of the charge contained in said Count I of the Indictment.

Is there any reason why the Court should not continue this case to a later date for the purpose of imposing judgment and sentence?

Mr. Pomeroy: I think that probably would be proper.

Mr. Dore: No objection, Your Honor.

The Court: What date would be convenient to the parties?

Mr. Pomeroy: I do not have my calendar with me.

Before we go into that matter, may I make a [146] further statement?

The Court: I will hear you.

Mr. Pomeroy: For the record, I would like to point out that some comment was made in the Court's decision to the effect that—talking about an unlawful association between the City police authorities and Federal Enforcement agencies. The record should show that at no time did the defendant ever urge in any way that such association, if any, between the City law enforcement officials and the Federal enforcement officials would be unlawful, that it was only urged that there was an association for the purpose of pointing out to the Court that should they be associated than the City officials are bound by the same rules of gathering evidence as the Federal officials,—not that that association would be unlawful. So there was no urging by the defendant in that particular;

Further, that I would like to point out to the Court that the room in which the defendant was arrested did have a closed door, which was testified to by the police officers.

The Court: The Court, responding to the last statement, will say that I did not so understand the testimony. I understood the door was ajar, and, therefore, [147] open or partly open, and the Court so finds from the evidence, and beyond a reasonable doubt, that the door was in the condition stated by the Court.

Mr. Pomeroy: I do not have my calendar here, your Honor, so I cannot make any suggestion.

The Court: Today is the 4th day of August. Will counsel be ready by the 12th day of August?—That is a Friday—at 10:00 o'clock in the forenoon?

Mr. Pomeroy: Yes.

The Court: The case is continued until Friday, August the 12th, at 10:00 o'clock in the forenoon.

Does either side wish a probation investigation and report in this case, or does each side think that with the statements that have been made by counsel concerning the defendant and his background the Court can adequately consider the matter at the time without the aid of the probation investigation and report?

Mr. Pomeroy: I would not request one, your Honor. I do not think it is necessary. I think that we have enough of a record here so that your Honor can be very well acquainted with the background of the defendant.

Mr. Dore: I agree, your Honor.

The Court: Very well; in view of the statements [148] of counsel the Court will dispense with the probation investigation and report in this case.

Those connected with the case are excused until the time previously stated.

(Concluded.)

CERTIFICATE

I, Bernard Ayres, do hereby certify that I was the official court reporter for the above entitled court between August 1, 1949 and August 6, 1949, and as such was in attendance upon the hearing of the foregoing matter. I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ BERNARD AYRES,
Court Reporter.

[Endorsed]: Filed Nov. 1, 1949. [149]

[Endorsed]: No. 12395. United States Court of Appeals for the Ninth Circuit. Ruis Parker, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 7, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 12395

UNITED STATES OF AMERICA,

Respondent,

vs.

RUIS PARKER,

Appellant.

STATEMENT OF POINTS UPON WHICH APPELLANT RELIES AND PORTIONS OF THE RECORD RELATING THERETO

Appellant, Ruis Parker, relies on this appeal upon the following points, to-wit:

1. The Court erred in denying defendant's petition and motion to suppress evidence.

2. The Court erred in admitting into evidence government's exhibits 1, 2 and 3.

3. The judgment of the Court was contrary to law.

4. The evidence was insufficient to support the judgment of the Court.

5. The Court erred in denying defendant's motion for a new trial.

The portions of the record necessary for the consideration of this point are:

1. All pleadings, affidavits and papers filed in this cause before the United States District Court heretofore designated by the defendant and trans-

mitted to the above-named Court by the Clerk of said District Court.

2. The entire transcript of record.

ALLAN POMEROY and
ERNEST R. CLUCK,
Attorneys for
Defendant-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 30, 1949.

No. 12395

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUIS PARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

ALLAN POMEROY,
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PUBLICATIONS PRESS

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SUMMARY STATEMENT

This is an appeal from a conviction in the District Court of the Western District of Washington, Northern Division, upon an indictment charging that the defendant did knowingly receive and conceal a quantity of narcotic drugs, to-wit: 204 grains of opium prepared for smoking and 75 grains of Yen Shee, knowing the same to have been imported into the United States contrary to law and in violation of Section 174, Title 21, U.S.C.

On the 12th day of August, 1949, the defendant was sentenced to a Federal prison camp for a period of ten months.

Prior to the trial and on April 21, 1949, the defendant moved to suppress evidence secured in his residence at the time of the arrest (R. pp. 4-5) supported by his verified petition (R. pp. 5-6) and prayed that the evidence be excluded from the trial of the action and returned to him. The arrest was made without warrant and no warrant for search of the defendant's residence was secured. The circumstances claimed to justify the arrest are set forth in the affidavits of the arresting officers (R. pp. 8 to 16) showing that they were not previously acquainted with the defendant but acting on an anonymous phone call, entered the defendant's apartment, opened the front door which was unlocked but closed, entered another door which was ajar and

a third door which was closed, found the defendant and, on search of the apartment, discovered opium smoking outfit and the opium and Yen Shee mentioned in the indictment. The affidavits of the defendant and Lottie Morgan and Robert D. Lee (R. pp 16 to 20) are to the effect that the outside door was locked.

The motion to suppress and return evidence was made at the commencement of the trial (R. p. 72) and motion for new trial was timely made following judgment of the Court (R. p. 48)

JURISDICTION

Violations of the above statute are cognizable only by United States District Courts, which have exclusive jurisdiction of crimes and offenses cognizable under the authority of the United States. The jurisdiction of the Court below was invoked under the following statutes:

Section 546, Title 18, U.S.C.A.
Section 41-2, Title 28, U.S.C.A.
Section 371, Title 28, U.S.C.A.

The jurisdiction of this Honorable Court is invoked under the provisions of Section 225, Title 28, U.S.C.A.

STATEMENT OF QUESTIONS RAISED

The only question raised by this appeal is as to the validity of the arrest of the defendant, the search of his residence and the seizure of the evidence listed in the indictment.

SPECIFICATIONS OF ERROR

No. 1: The District Court erred in overruling the defendant's motion to suppress and return evidence (R. pp. 4-5).

No. 2: The District Court erred in overruling the defendant's motion made at the commencement of the trial to suppress and return evidence (R. p. 72).

No. 3: The District Court erred in overruling the defendant's motion timely made for a new trial. (R. p. 48).

ARGUMENT

Specifications of Error 1, 2, and 3

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

—Article IV, Amendments, Constitution of the United States.

As all specifications of error deal with the single question as above stated, to-wit: the validity of the arrest, search and seizure, in the interest of time and space economy, the three specifications of error will be argued as one.

On the 24th day of November, 1948, between 9 and 9:30 P. M., (R. p. 86) Robert W. Morris was on duty as supervising Captain of the night shift and captain of the felony squad of the Seattle Police Department. He had been with the department for seventeen years. At about the time mentioned, according to his testimony, he recevied an anonymous telephone call advising him that a man was at 1219½ Yesler Way, Seattle, Washington in Apartment B who "looked like he was poisoned, in bad shape, and somebody better get up there in a hurry. I tried to find out who the man was or where he was. He wouldn't tell me. He said 'you

get up here and I will be here.'" (R. pp 74-75, 90). Stating that he had a call for another case requiring an entire squad and as 12th and Yesler was not too far out of the way, he directed officers Zuarri, Waitt, Musselman and Ivy to meet at 12th and Yesler immediately. (R. p. 93). The officers left in three police cars (R. p. 97). Officers Zuarri and Waitt arrived around 9:15 o'clock and found Capt. Morris already at the designated corner waiting for them. The other car arrived a few minutes later (R. p. 109, possibly five minutes or more later, R. p. 118). They found the street door of the designated address closed but not locked. Capt. Morris directed two of the officers to wait outside (R. pp. 78-9) and two of the officers accompanied Morris, opened the outside door and climbed the stairs leading to Apartment B. "I told Waitt and Musselman to come with me and the others to stay outside. I told them that until we found out what it was all about, so we didn't look like a bunch of policemen climbing the stairs." (R. p. 78). They came to Apartment B, the residence of the defendant (R. p. 186) and noticed that the door was ajar (R. p. 95). They called out: "I didn't want to get shot" according to Capt. Morris (R. p. 96). They entered the defendant's apartment without having any idea that narcotics would be discovered in the room (R. p. 98), and under the belief that "someone was in bad shape, that they were sick and needed police help or assistance" (R. p.

77). They entered the apartment and saw another inside door closed, which they opened and discovered the defendant with exhibit 1 beside him and in a groggy but cooperative condition. (R. pp. 96, 97). The defendant was lying on his bed. (R. p. 80). They thereupon placed him under arrest, handcuffed him, took him out in the other room (R. p. 80) and proceeded to search the apartment. They found exhibit 2, being the narcotics mentioned in the indictment (R. p. 149). The search lasted approximately 20 minutes (R. p. 82). All officers participated in the search, the two remaining below being summoned immediately after the arrest (R. p. 80).

The three police cars were arranged as illustrated in defendant's exhibit A2 (R. p. 100) in a manner to attract little attention and insure easy exit from the scene.

The officers did not smell opium prior to entering the apartment (R. p. 83).

The defendant Ruis Parker was a resident in the particular apartment for 9 years last prior to the arrest.

We have been unable to find, in a survey of the reported decisions, a case where police officers have acted with less evidence to justify the arrest and entry of the premises, a search and seizure, as in the case at bar. The closest case on the facts appears to be *United*

States vs. Clark, D. C. Mo. 1939, 29 F. Sup. 139. In that case, to justify the arrest, 1, the agent who arrested the defendant had seen her enter and leave a grocery store known to him to be a place where there had been traffic in narcotics; 2, the agent knew the defendant was an addict; 3, immediately before the arrest, the defendant's companion, an informer, known by the agents to be reliable, indicated to them that the defendant had narcotics. Under this factual situation, the Court said:

> "It seems that the Fourth Amendment to the Constitution is whittled away to nothingness if it held that a citizen may be arrested and searched without a warrant of arrest or a search warrant if only it is shown that some reliable informer has said the citizen has committed or is committing a felony, without any showing whatever, and there was none here, that the informer's information was itself more than mere guesswork and speculation."

> "We must now confess that we now draw back a little when we hear asserted a claim of constitutional right in a criminal case. Almost always as it is in this instance, it is advanced to shield an individual who is guilty from the justice of the law he has flouted. The only satisfaction we can derive from maintaining the constitutional rights of such a person arises from the knowledge that the obligation of the judicial oath requires it and from the certainty that only so may the protection of the Constitution be preserved against the day when innocent men will need it as a defense from governmental tyranny."

"Motion to suppress evidence granted."

In *Kroska vs. United States*, CCA, 1931, 51 Fed. 2d, 330, the defendant was arrested by Federal agents who observed his automobile drive into his yard. They drove in behind it and observed the doors closed, the motor not running, no one in it and the rear deck open a few inches. They could see a keg in the rear compartment. The agent then entered the grade basement door of the house, found the defendant and placed him under arrest. In the yard before entering, they noticed a strong smell of moonshine. Neither of the officers saw defendant until Rhoades arrested him in the house.

> "The prohibition officers had neither a search warrant nor a warrant for the arrest of defendant. It is quite generally held that where a defendant is lawfully placed under arrest, then as an incident to such arrest he may be searched, as many also the place of his arrest. Here, however, with no previous knowledge of the facts or circumstances warranting even a suspicion that defendant was guilty of violating the National Prohibition Act, or that his automobile had been illegally transporting liquor, the officers entered his private premises. One of them, uninvited, entered his home, and finding him upstairs arrested him. The premises entered constitute the curtilage of defendant's home . . . It cannot well be claimed that this was a lawful arrest; in fact, it was flagrantly lawless so far as appears from the record, and the only facts or circumstances known by the officers which might lead a reasonably discreet and prudent man to believe that liquor was illegally possessed in the automobile were such as were obtained by them by reason of their lawless invasion of the premises constituting the curtilage of defendant's home. In other words, they were wrongfully upon the premises of defendant and were wrongfully searching

his possessions at the very time they looked into the rear deck of the Oldsmobile coupe and obtained the information upon which the Government seeks to justify the search and seizure. This Court, in *Day v. United States, supra*, in an opinion by Judge Kenyon, said:

" 'Probable or reasonable cause is a belief fairly arising out of facts and circumstances known to the officer that a party is engaged in the commission of a crime.'

"The Supreme Court, in *Byars v. United States*, 273, S. 28, 47 S Ct. 248, 71 L. Ed. 520, said:

" 'Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challange has been interposed.'

"In *Go Bart Importing Co. v. United States*, 228 U. S. 344, 75 L. Ed. 375, in an opinion by Mr. Justice Butler, it is said:

" 'The first clause of the Fourth Amendment declares: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." —*Article IV, Amendments, Constitution of the United States.* It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent and unquestionably extends to the premises where the search was made and the papers taken.' "

In the case at bar, the officers saw nothing, had no reason to believe that narcotics were in the premises and acted only on the tip of an unknown informer, speaking over the telephone.

The facts in *Hernandez v. United States* C.C.A. 9th, 1927, are stated in the following excerpt, 17 Fed. 2d, 373:

> "Upon the writ of error the single question is presented whether the evidence obtained upon the search of the person of the defendant should have been excluded, timely application having been made for its return. The defendant was arrested without a warrant. Federal narcotic agents were watching a house at which it was believed narcotics had been sold. They saw the defendant coming from the rear of the house, accompanied by a women, who was a narcotic peddler and saw them proceeding down the street looking around in different directions "in a rather suspicious way." They arrested both the defendant and the woman. They found no narcotics on the woman, but in searching the defendant they found morphine in his overcoat pocket. The admissibility of evidence so obtained depends upon the question whether there was probable cause for the arrest. The generally accepted rule is thus expressed in 2 R.C.A. 451: 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.' The officers who made the arrest knew nothing whatever of the defendant or his prior conduct. The fact that he was seen coming from a suspected house in company with a suspected woman, and that he and the woman were walking down the street looking around in what the officers thought was a suspicious man-

ner, whatever that may have meant, constitutes all of the evidence of probable cause. It falls far short, we think, of presenting reasonable grounds of suspicious supported by facts which would warrant a cautious man in believing that the defendant had committed a felony. At most, the circumstances were sufficient to create only a suspicion and suspicious circumstances, it has been repeatedly held, do not constitute probable cause. It is true that the defendant was arrested in the commission of a felony, as was subsequently developed, but the officers were not appraised of that fact by their senses or otherwise, and they had no reasonable ground to believe it. *Brown v. United States C.C.C.* 4 F. 2d, 246. Judgment reversed and cause remanded."

In the case at bar the officers acted solely on an anonymous telephone call.

In *Poldo v. United States*, C.C.A. 9th, 1932, 55 Fed. 2d, 866, the officers, sometime earlier, saw the defendant carrying what appeared to be a metal disc with a piece of tin around it "such as is used in making the reeding or knurled edge on counterfeit silver dollars." He was followed to a garage built in a dwelling house and was observed to enter with the articles mentioned. Two weeks later on an affidavit which ommitted the time and day of the existence of the grounds for the search and consequently was defective for that reason, the warrant for search was issued and the garage was searched. Not finding anything in the garage, the search continued to his private dwelling, it not appearing that any doors were physically broken, a plaster cast was found and the defendant arrested.

"In *Stacey v. Emery*, 97 C.S. 642, 645, 24 L. Ed. 1035, the Supreme Court thus defined probable cause: 'If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.' See also other cases quoted or cited in *Carroll v. United States*, 267 U. S. 161, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790."

"And as pointed out in *Lawson, et al, v. United States, Supra*: *The probable cause must be determined by the existence of facts known to the officer before, not after, the search.*"

"Though in *these cases seizures without search warrants, and not arrests, were involved, the doctrine is identical.* In *Baumboy v. United States*, C.C.A. 24 F. 2d, 512, however, both arrest and seizures were considered by this court. Judge Dietrich saying 'For defendant in error it is urged that the seizure may be justified as an incident of the arrest, but the arrest was to say the least no more defensible than the search.'

"To justify the search of a man's home as an incident to an arrest made upon a cause so lacking in probability would, we believe, result in at least a partial nullification of the Fourth Amendment. Such an arrest would not be in keeping with the letter or the spirit of the amendment or of the Supreme Court decisions interpreting it." Judgment reversed.

Where prohibition agents forced entrance into a building in which they believed, principally from their sense of smell, that an illicit still was in operation, and arrested those who were operatng the place on the theory that a crime was being committed in the officers' presence, the Court, in *United States v. Hirsch*,

1932, D. C. 57, F. 2d, 555, while recognizing the rule that a search may be made as an incident of a lawful arrest, stated that the cases cited in support of that proposition had no application since, in this instance the forced entry into the building constituted a search which preceded the arrest, and that to come within the theory of the cases referred to, the arrest must precede the search. It was held that the evidence did not justify the officers' conduct in this instance. See Annotation 82 A.L.R. 782.

Two recent decisions of the Supreme Court bear study in connection with the case at bar. The first is *Harris v. United States*, 1947, 67 S. Ct. 1098. In this case officers, under authority of a warrant charging violation of a mail fraud statute and a warrant charging transportation of a forged check in violation of the Stolen Property Act, arrested defendant in the living room of his four room apartment and while making incidental search, discovered forged draft cards in a bureau drawer. In a prosecution for violation of Selective Service Act by concealing and altering draft cards, the majority of the court held that the record sustained findings that the officers conducted search in good faith for the purpose of discovering stolen checks, and that evidence of a separate crime could be used.

Even in such a case where the officers had entered the premises and were making a valid search thereof

pursuant to a valid arrest following a valid warrant for arrest, it is significant that four members of the Supreme Court dissented in a most analytical and comprehensive analysis of the law relating to unlawful searches. Their comment here is significant inasmuch as later in 1947 a case directly in point was decided in which the dissenting judges wrote the majority opinion—*Anne Johnson vs. United States*, 333 U. S. 10-17, an appeal through this Circuit Court from the District Court of the forum of the case at bar.

Judge Frankfurter, in dissent in the Harris case, after considering the history of the statute and observing that "historically we are dealing with a provision of the Constitution which sought to guard against an abuse that more than any one single factor gave rise to American Independence."

"The plain import of this is that searches are 'unreasonable' unless authorized by a warrant and a warrant hedged about by adequate safeguards. 'Unreasonable' is not to be determined with reference to a particular search and seizure considered in isolation. The 'reason' by which search and seizure is to be tested is the 'reason' that was written out of historic experience into the Fourth Amendment. This means that, with minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant."

"Much is made of the fact that the entry into the house was lawful. But we are not confined to issues of trespass. The protection of the Fourth Amendment extends to improper searches and seizures, quite apart from the legality of an entry."

Justice Murphy criticized the case as restoring the general search warrant, lacking all constitutional safeguards, and offered a scholarly summary of the court's decisions strictly limiting the authority of officers to search incidental to a valid arrest.

Justice Jackson, following the dissents, observed:

> "The amendment, having thus roughly indicated the immunity of the citizen which must not be violated, goes on to recite how officers may be authorized, consistent with the right so declared, to make searches." . . . . "and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." Here endeth the command of the forefathers, apparently because they believed that by thus controlling search warrants they had controlled searches. The forefathers, however, were guilty of a serious oversight if they left open another way by which searches legally may be made without a search warrant and with none of the safeguards that would surround the issuance of one."
>
> "In view of the long history of abuse of search and seizure which led to the Fourth Amendment, I do not think it was intended to leave open an easy way to circumvent the protection it extended to the privacy of the individual life. In view of the readiness of zealots to ride roughshod over claims

> of privacy for any ends that impress them as socially desirable, we should not make inroads on the rights protected by this Amendment. The fair implication of the Constitution is that no search of premises, as such, is reasonable except the cause for it be approved and the limits of it fixed and the scope of it particularly defined by a disinterested magistrate. If these conditions are necessary limitations on a court's power expressly to authorize a search, it would not seem that they should be entirely dispensed with because a magistrate has issued a warrant which contains no express authorization to search at all.
>
> "Of course, this, like each of our constitutional guarantees, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers, and effects which is indispensable to individual dignity and self respect. They may have overvalued privacy, but I am not disposed to set their command at naught."

The above comments, as observed, are significant inasmuch as the dissent judges the same year wrote the majority opinion on the Anne Johnson case. There the arrest was made in a hotel room in Seattle by officers acting on a tip from a confidential informer, known to them, who was also a known narcotic user. The informer was taken to the hotel to interview the manager, and he returned saying he could smell burning opium, and between 8:30 and 9:00 o'clock returned to the hotel with agents who smelled the opium.

> "The government, in effect, concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her room

and found her to be the sole occupant. It points out specifically, referring to the time just before entry, "For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might have been an opium smoking den' and it says . . . "that when the agents were admitted into the room and found only the petitioner present they had a reasonable basis for believing that she had been smoking opium and thus illicitly possessed the narcotics. Thus the government quite properly takes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after and wholly by reason of their entry of her home. *It was therefore their observations inside of her quarters, after they had obtained admission, under color of their police authority, on which they made the arrest."*

"Thus the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies, must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effects" and would obliterate one of the most fundamental distinctions between our form of government where officers are under the law and the police-state where they are the law."

Reversed.

CONCLUSION

The foregoing discussion is based on the testimony of the prosecution witnesses, mainly the testimony of the arresting officers. It can again be observed that on a review of the reported cases it appears that no thinner justification for an arrest, an entry into a private dwelling, a search and a seizure without warrant, has ever been submitted to a Court of record. A review of the evidence in its entirety makes the story of the police officers incredible and takes the substance from the thin thread of reasonableness that has been submitted.

The uncorroborated testimony of one police officer —Capt. Morris, that an unknown voice states that a theretofore unknown man is in need of police help— not the help of a doctor or an ambulance and none is called (R. p. 92), but the help of the police department, felony detail. Capt. Morris does not call a local prowler car or refer the matter to the policeman on the beat; this, according to him is something that demands the attention of headquarters.

Then, by sheer coincidence and happenstance, an entire felony squad of five officers are ready to go out on another call and it just happens that 12th and Yesler is en route. Three cars were used—not at all for the reason that one or two of the cars might run into trouble at the address because no one has any

reason to expect trouble or to think other than a man is in need of humanitarian assistance.

Capt. Morris arrives first—in his mind is only that a man is dying, possibly poisoned, "in a bad way." Does he run up to the apartment? No, he waits for the next car and when it arrives the three officers wait five or more minutes for the third car with the other officers. Without any premeditation or design, the cars are brought in in a manner to attract the least attention and to insure a quick retreat—only out of habit in police work.

Every disinterested witness and the defendant testified that the street door to the building was always locked: An attorney who owned the fee title to the property (R. p. 152), the owner-manager (R. p. 179), another tenant (R. p. 174), and the defendant (R. p. 186). But by bald chance at the time Capt. Morris and his men tried the door it was closed but not locked and they entered leaving two officers outside even though it appears that it was raining. The door to defendant's apartment is ajar—an invitation for the officers to enter. At this time Capt. Morris feels the length to which this happy chain of events has stretched and he becomes somewhat apprehensive. He does not think that he is going to make an arrest and search the premises and seize contraband property—he is thinking only of the man in distress, but he nevertheless

calls out. He says he does this because he does not want to get shot at. Why should anyone shoot at a man on an errand of mercy? Behind a closed door he discovers the defendant, groggy, but cooperative and the defendant points to exhibit 1 and says "there it is." They handcuff him for some reason, and search and find exhibit 2.

In truth, regardless of their testimony as to their intention and the working of their minds, the police officers in this case followed typical raid procedures. Their actions bely their claimed intentions.

We respectfully submit that the above testimony of the police officers as to their state of mind in making the entry, arrest, search and seizure is meant for gullible minds—that it is beyond reasonable belief.

At best, given full credence, the testimony falls far short of tests of reasonableness established by the decisions of all United States Courts—in determining whether an arrest, search and seizure is reasonable under the terms of the Fourth Amendment to the Federal Constitution. On analysis, the testimony appears to be a mere sham.

In closing, let us observe this: If an entry into a private residence, an arrest, a search and a seizure can be justified by the uncorroberated testimony of an arresting officer of a telephone call from an unknown

informer—if that amount to reasonableness, the guarantees of the Fourth Amendment against unreasonable searches and seizures is without meaning. We respectfully petition that the judgment of the District Court be reversed.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUIS PARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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STATUTES

Section 174, Title 21, U.S.C. 1

No. 12388

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

JURISDICTION

The appellant was indicted in the Northern Division of the Western District of Washington, for violating Section 174, Title 21, U.S.C.; entered a plea of not guilty; was tried before the Honorable John C. Bowen, sitting without a jury; convicted and

sentenced to serve ten months in custody. From this conviction the appellant appealed. The appellant is presently at liberty on bond.

The indictment is set out on page 2 of the Transcript of Record. The statutes authorizing review by this Court are set out on page 4 of appellant's brief.

STATEMENT OF THE CASE

The indictment charges the appellant with receiving and concealing opium and yen shee knowing the same to have been imported contrary to law. Prior to the trial the appellant moved to suppress the evidence claiming that the narcotics which the Government intended to use as exhibits were seized as the result of an unlawful search. This motion was heard upon affidavits submitted by both sides. Upon considering the evidence thus adduced, the trial Judge denied the motion to suppress. The trial Judge made the following finding in the order denying the motion to suppress:

> " * * * the Court finds from the evidence that the police officers who seized the narcotics from the home of the defendant Ruis Parker were acting upon an emergency and had no knowledge or suspicion of any violation of the Federal Narcotic Laws nor any reason for securing a search warrant until the narcotics were discovered in the defendant's possession during the course of

the police officers' investigation of an emergency; * * *" (T.R. 26, 27).

The evidence adduced at the trial and the evidence adduced by affidavits on behalf of the Government in resisting appellant's motion to suppress revealed the following facts:

Captain Morris was the Supervising Captain of the night shift and the Captain of the Felony Squad of the Seattle Police Department. His squad consisted of four other members, Officers Zuarri, Waitt, Musselman and Ivy. On the night of November 24, 1948, Captain Morris and his squad were preparing to depart from the police station to work on a case. At approximately 9:30 Captain Morris received a telephone call from an unknown party. The caller did not identify himself, but told Captain Morris that there was a man in Apartment B at 1219½ Yesler who was poisoned and in bad shape, and somebody had better get up there in a hurry. (T.R. 75). Since the address given over the telephone was in the general direction of the destination of Captain Morris' squad on the case they were about to work on, Captain Morris decided to stop at this address to determine what the trouble was. Captain Morris told the members of his squad to meet him at 12th and Yesler. Captain Morris proceeded to this address in his car,

and the other members of this squad proceeded to 12th and Yesler in two separate cars. When the squad assembled in front of a two-story apartment house located at 1219½ Yesler Way, Captain Morris directed two of his squad to remain on the street and took the other two men with him. The three officers then walked into the apartment building. The ground floor entrance door was closed but not locked. The officers saw no one in the hall, although the voice on the telephone had advised Captain Morris that he would meet the officers at the apartment. The officers climbed the stairs to the second floor where they found the door leading to Apartment B open approximately one foot. Captain Morris called out, "Is anyone home?" several times while pushing the door open and walking into the apartment. No response was heard from within the apartment. The three officers walked into the living room and then into the dining room of the apartment. Captain Morris opened a door leading off from the dining room, calling out, "Is anyone home?" Upon opening the door Captain Morris found himself in a bedroom where the appellant was lying upon the bed with his eyes shut. The appellant opened his eyes as Captain Morris walked in. Captain Morris asked, "What seems to be the trouble?"

The appellant stated, "There it is." Captain Morris said, "There what is?" The appellant said again, "There it is." Captain Morris again asked "There what is?" Upon looking down towards the foot of the bed Captain Morris then saw an opium smoking layout and a bottle of opium (T.R. 80, 84).

The appellant was then arrested. The appellant was in a groggy condition at that time (T.R. 84). Captain Morris summoned his other two officers and a search was made of the premises.

Two days later Captain Morris called the Federal Bureau of Narcotics and turned the case over to that agency (T.R. 10). The appellant's motion to suppress the evidence was renewed at the beginning of the trial.

At the conclusion of all the evidence and after counsel for both sides had argued, the Court rendered an oral decision (T.R. 195-199).

The foregoing narrative of the facts of this case are in accord with the findings of the trial judge as set out in the oral decision wherein the renewed motion to suppress the evidence was again denied.

QUESTION RAISED

When state police officers in the course of their

normal duties, responding to an anonymous telephone call indicating a man has been poisoned and needs help, enter an apartment through an open door and therein find contraband narcotics in plain sight and seize the same, have the constitutional rights of the owners been violated?

SPECIFICATIONS OF ERROR

The specifications of error upon which the appellant relies are set out on page 3 of the appellant's brief. The first two specifications of error are directed to the Court's overruling of the defendant's motion to suppress the evidence both before and during the trial. In the third specification of error the appellant claims the Court erred in overruling his motion for a new trial.

ARGUMENT ON SPECIFICATIONS OF ERROR No. 1 and 2

SUMMARY

The police officers were responding to a grave emergency. It had been reported to them that a man was dying. They entered the Appellant's apartment through an open door calling out "Is anyone home?" The police officers had no suspicion that they would find a violation of the Federal Narcotic Laws. The discovery and seizure of the contraband was purely

by accident because of its being in plain sight of the officers. Two days later the case was turned over to the Federal authorities on a silver platter. The search was not made by Federal officers.

ARGUMENT

The appellant in his brief argues under Specifications of Error 1 and 2 that the search and seizure made by the Seattle Police under supervision of Captain Morris was unreasonable. In support of the Appellant's argument several cases are cited where Federal agents, or local police cooperating with Federal agents, have made an illegal search and seizure based upon bits of information which led the officers to believe that a crime had been committed. In each of the cases cited by the Appellant the officers entered the premises for the purpose of making a search.

In the case at hand the Seattle Police officers entered the Appellant's apartment on a mission of mercy in answer to what amounts to a call for help, a grave emergency. The police officers had no idea any Federal crime was being committed within the premises at the time they entered. The police officers entered an open door calling out many times "Is anyone home?" The Appellant calls this a raid. After the police officers discovered the Appellant,

in what is described in the evidence as being in a groggy condition, the contraband narcotics were discovered, not by search, but by virtue of the fact that the opium layout and some of the opium was lying in plain sight by the Appellant on the bed. Thereafter the Appellant was arrested and an additional search was made. Two days later the City police officers virtually turned the case over to the Federal officers on a silver platter. There is not one word of evidence to indicate that the Federal officers had any knowledge of the Appellant or his unlawful activities prior to this time.

The Appellee contends that the search and seizure were not made by Federal officers, therefore the provisions of the Constitution are not applicable.

As the Supreme Court of the United States stated in *Lustig v. United States*, 338 U.S., 74, 78-79, "It is not a search by a Federal official if evidence secured by State authorities is turned over to the Federal authorities on a silver platter." The evidence clearly shows, and the trial judge so found, that this is exactly what happened in the case at hand. (T.R. 195-199).

The Appellant seeks support in the case of *United States v. Clark*, D.C. Mo. 1939, 25 Fed. Supp. 139. In that case the officers were specifically looking for

narcotics. In the case at hand no such facts exist, therefore the Clark case is of no help.

The Appellant cites *Kroska v. United States*, 51 Fed. (2d) 330. In that case the officers saw a keg in the rear compartment of the defendant's car which was in the garage, the officers further noticing a strong smell of moonshine. There, again, the officers were looking for contraband. No such facts exist in the case at hand. Therefore, the Kroska case is of no support to the Appellant.

The Appellant cites *Hernandez v. United States*, 17 Fed. (2d) 373. In that case the Federal Narcotic Agents were watching a house in which it was believed narcotics had been sold. There, again, the officers were specifically looking for contraband, which fact distinguishes the Hernandez case from the case at hand.

The Appellant cites *Poldo v. United States*, 55 Fed. (2d) 866. In that case the officers saw the defendant carry a metal disc, such as is used in making the reeding or knurled edge on counterfeit silver dollars. Here, again, the officers were specifically looking for a Federal law violation, which fact distinguishes the Poldo case from the one at hand.

The Appellant cites *United States v. Hirsch*, 57

Fed. (2d) 555. In that case the officers entered a building in which they believed, principally from their sense of smell, that an illicit still was in operation therein. Here, again, the officers were specifically looking for contraband.

The Appellant cites the case of *Johnson v. United States*, 333 U.S., 10. In that case the officers had previous information through an informer that the defendant was smoking opium in her hotel room. The officers entered the defendant's premises for the specific purpose of enforcing the Federal Narcotic Laws. This fact distinguishes the Johnson case from the case at hand.

It is submitted that the Appellant has not cited one case where a search and seizure has been held illegal where the State officers, in the course of their normal duties, have unintentionally discovered the contraband.

The Appellant further argues that the narrative of events as related by the Seattle Police officers is incredible and not worthy of belief. The trial judge had an opportunity not only to hear the witnesses but to observe their manner and demeanor upon the witness stand. The trial judge in his oral decision at the conclusion of all the evidence found that the narrative as told by the police officers was true. Thus,

the Appellant, in his argument, in reality, is asking this court to substitute its judgment as to the credibility to be given the witnesses and to reverse the Findings of Fact made by the trial judge. This is not a cese where it is claimed that there is not sufficient evidence to support the Findings of Fact made by a trial judge. The Findings of Fact made by the trial judge are exactly in accord with the testimony of the Seattle Police Officers, of which there is an abundance.

If the Appellant's apparent theory of this case were followed, police officers would be prohibited from entering private dwellings where there was an indication that someone therein was dying and needed help. Activities and duties such as these are lawful, and it is to be expected that police officers will diligently perform them.

In *McDonald v. United States*, 335 U.S. 451, the opinion uses the following language:

> "This is not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law. * * * *
>
> "Where as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. * * * "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police."

Under the Appellant's theory of this case, the police officers, upon finding the Appellant in a groggy physical condition with a hot opium pipe beside him, should have turned around and walked out to go find a Commissioner and obtain a search warrant. The fallacies of such reasoning are obvious. If such had been the intention of the framers of the Constitution, it would have been a simple matter for them to have stated that no search and seizure would be lawful unless performed in accordance with a search warrant. However, the framers of the Constitution sought only to protect the citizenry against *unreasonable* searches and seizures.

The case of *Symons v. United States*, decided December 14, 1949, by the Court of Appeals for the Ninth Circuit, is relied upon by the Appellee. In that case the Court sustained the decision of the trial judge in overruling a motion to support the evidence. In that case the State Officers were following the trail of some marihuana. Upon demanding entrance to the defendant's home, the defendant refused to allow them to enter. One of the officers threw a flower pot through the window, by which means he and other officers entered the house. The ensuing search produced a large quantity of marihuana. Within approximately an hour the State Officers de-

cided to turn the case over to the Federal agents. The following is quoted from the decision:

> "Appellant contends that the local police were acting as "agents" for the Federal Government but the evidence wholly fails to support this allegation and the court so found. These state officers were fully aware that possession of marihuana constitutes an offense against the laws of the State of California amounting to a felony. For us to say that under the circumstances here shown the federal officers had no lawful right to accept this marihuana from the state officers and that by accepting it they somehow violated the 'constitutional rights' of a willful law violator, would delight those who profess to see nothing but evil and sinister design in efforts of law enforcing agencies to protect organized society against the criminal activities of men engaged in a vicious and degrading traffic. As respects this phase of the case the record provides no indication or evidence whatever that the local police had decided (to employ their vernacular) to 'take it federal' until *after* the arrest was made by them, and *after* the completion of their search and seizure and careful marking of the seized marihuana, for identification."

The case at hand is even stronger in favor of the Government than the Symons case. In the case at hand the officers entered the premises through an open door on an emergency, a mission of mercy, with no thought or suspicion that they might discover a violation of Federal laws therein. The trial judge committed no errors in overruling the Appellant's motions to suppress.

ARGUMENT ON SPECIFICATION OF ERROR 3

SUMMARY

Refusal of the District Court to grant a new trial is not assignable as error on appeal.

ARGUMENT

The Appellant's third specification of error is, "The District Court erred in overruling the defendant's motion timely made for a new trial." It has been well settled in this court as well as in the United States Supreme Court that such an error is not proper grounds for an appeal.

In *Wheeler v. United States*, 159 U.S. 523, 40 L.Ed. 244, the opinion states:

> "Another contention is that the Court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. *Moore v. United States*, 150 U.S. 57; *Holder v. United States*, 150 U.S. 91; *Blitz v. United States*, 153 U.S. 308."

For other cases with like holding, see *Klune v. United States*, 159 U.S. 590, 40 L.Ed. 269, and *Lueders v. United States*, 210 Fed. 419 (9 Cir.).

CONCLUSION

The City police officers acting entirely upon their own in the performance of their normal functions in response to an emergency call, having unintentionally discovered the contraband narcotics, and two days later having turned the evidence over to the Federal agents, who prior to that time had no knowledge of the case, did, in fact, hand the case to the Federal authorities upon a silver platter, and any search and seizure made by the City police officers was not made by Federal officials.

Respectfully submitted,

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